

Volume 6

Pages 1058 - 1219

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ALSUP

LISA GARVEY, individually and on)
behalf of all others similarly)
situated,)

Plaintiff,)

VS.)

No. C 11-2575 WHA

KMART CORPORATION, and DOES 1)
through 50 inclusive,)

Defendants.)

San Francisco, California

Tuesday

November 20, 2012

TRANSCRIPT OF PROCEEDINGS

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P R O C E E D I N G S

NOVEMBER 20, 2012

7:33 a.m.

THE COURT: Back on the record. Anything I can help you with before we get started?

MR. MATTHEW RIGHETTI: We have a stipulation to move what is Docket No. 199, a joint stipulation and order concerning certain testimony into evidence as Exhibit 389.

THE COURT: 389 received in evidence, unless I hear an objection.

MR. WOHL: No objection, your Honor.

THE COURT: Thank you. All right.

(Trial Exhibit 389 received in evidence. Later remarked as Exhibit 390.)

MR. WOHL: And then, your Honor, you asked yesterday for a writing which specified those video clips by file numbers so you could record them. I have those. They are under Exhibits 218-E and G. And with that, I would ask that those exhibits be formerly moved into evidence.

(Document was tendered to the Court.)

THE COURT: All right. The Court will receive in evidence those items that are identified in the two files that you have just handed me, unless I hear an objection.

MR. DOSTART: No objection, your Honor.

THE COURT: No objection. All right.

For the record, are called Defendant Kmart Corporation's

1 List of Video Clips Utilized at Trial, Exhibit 218-E. And the
2 other one is the same, but 218-G. And they bear today's date.
3 I guess it's today's date, is that correct? Yes.

4 All right. So those are received in evidence.

5 (Trial Exhibits 218-E and 218-G received in evidence)

6 **MR. WOHL:** Thank you, your Honor.

7 **THE COURT:** Okay. What else?

8 **MR. DOSTART:** Nothing more from plaintiffs, your
9 Honor.

10 **THE COURT:** All right. Where is our witness? There
11 he is.

12 Dr. Fernandez, you may resume the hot seat. Welcome back.
13 Please have a seat. Adjust the microphone so that you are
14 heard all over the courtroom.

15 Counsel, are you ready?

16 **MR. DOSTART:** May I begin?

17 **THE COURT:** Are you ready over there?

18 **MR. WOHL:** Yes, your Honor. Thank you.

19 **THE COURT:** Please proceed.

20 **JEFFREY FERNANDEZ,**

21 called as a witness for the Defendant herein, having been
22 previously sworn, resumed the stand and testified further as
23 follows:
24
25

CROSS EXAMINATION RESUMED

BY MR. DOSTART:

Q. Dr. Fernandez, did you have any communications to or from your attorneys since we left the courtroom or since you left the witness stand yesterday?

MR. WOHL: Objection, your Honor. We're not his attorneys, so this misstates the evidence.

MR. DOSTART: Excuse me.

BY MR. DOSTART:

Q. Did you have any communications to or from the attorneys that are working for Kmart on this case since you left the witness stand yesterday?

A. No.

Q. Did you have any communications with anyone who had communications with the attorneys that are representing Kmart in this case since you left the witness stand yesterday?

A. No.

Q. Dr. Fernandez, I would like to speak with you for a moment about static posture.

On Page 140 of your book you begin Chapter 10, which is entitled "General Workplace Design Principles." And Section 10.2 of that same page is entitled "General Guidelines For Ergonomic Design of the Workplace."

Beneath that is a header entitled, "One," and it states that -- it states: "Aim at dynamic work. Avoid static work."

1 Do you remember that phrase?

2 A. Yes.

3 Q. That section states that:

4 "Work should be dynamic in nature. In other words,
5 work should involve movement and the body should not
6 be stationary or static for a significant period of
7 time."

8 Do you stand by that statement?

9 A. Yes.

10 Q. It says:

11 "Static work is inefficient and accelerates the onset
12 of fatigue. Static postures cause problems in the
13 muscles, joints and blood circulation."

14 Do you stand by that statement?

15 A. Yes.

16 Q. It then states that: "Examples of static loading
17 include..." And it has a list.

18 A, is when the work surface is too high.

19 B, is when the work surface is too low.

20 D, is when you're holding or carrying a load.

21 E, is holding or maintaining a part of the body in a
22 non-neutral awkward posture.

23 There is nothing further after E.

24 Now, C is: Standing for extend the periods of time.

25 Do you agree, Dr. Fernandez, that standing for an extended

1 period of time is an example of static loading?

2 **A.** Static without movement, yes. Without movement.

3 **Q.** And, Dr. Fernandez, do you -- so you to stand by the
4 statement that standing for an extended period of time is an
5 example of static loading?

6 **A.** Sir, I said static work. An example of static work is
7 standing for a -- an extended period of time, as I put on
8 there, without movement.

9 **Q.** Does it say that in your book?

10 **A.** It may not say that in the book, but that's what I train
11 my students that's what static means. That's what I tell them.

12 **Q.** Does that say that in your book?

13 **A.** It does not.

14 **MR. WOHL:** Objection. Asked and answered.

15 **BY MR. DOSTART:**

16 **Q.** Dr. Fernandez, do you agree that static work should be
17 avoided?

18 **A.** Yes, yes.

19 **Q.** Dr. Fernandez, are all the statements that we read from
20 your book today and yesterday truthful and accurate statements?

21 **A.** Those are statements in the book and they are truthful, of
22 course. That's --

23 **Q.** Okay.

24 **A.** (Continuing) -- what I --

25 **Q.** I'm sorry. Finish your answer.

1 I want to make this easy on Ms. Sullivan [sic]. So were
2 you finished with your answer?

3 A. No.

4 Q. Please finish your answer.

5 A. That's what I use to train students and if I'm not
6 accurate, I'm going to get myself into trouble.

7 Q. Now, Dr. Fernandez, is it true that you would have been
8 more careful about how you phrased things in your book if you
9 knew that you were going to be testifying on behalf of Kmart in
10 this case?

11 A. I will answer in the sense that if I knew this was going
12 to be read by attorneys, I would have been very careful how I
13 phrased it.

14 For engineers I have an opportunity to explain to them in
15 a class. This is not an online course or something that you
16 read. I teach them in a classroom.

17 Q. Okay. Dr. Fernandez, I'm going to read from your
18 deposition taken on Thursday, October 4th, 2012 in this case
19 from Page 45, Lines 16 through 25:

20 "QUESTION: Do you believe that your book represents
21 an accurate statement of the ergonomic principles as
22 it relates to lifting items from a seated position?

23 "ANSWER: My book is written for engineers. My book
24 was not written for attorneys. So it's a big
25 difference. If I had to -- if I knew this was

1 coming, I would be more careful how I phrased things
2 in that book."

3 "Ms. Sommerfeld: You probably wouldn't right any
4 books, would you?"

5 Dr. Fernandez, isn't it true that you probably wouldn't
6 write any books if you knew you were going to be testifying on
7 behalf of Kmart in this case?

8 **A.** I have published papers for the last 25 years. I have
9 written this book, the first edition of this book more than 15
10 years ago.

11 **Q.** Okay.

12 **A.** And this book, as a professor, is public -- publish or
13 perish. There is no way that I would have not written the
14 book.

15 **Q.** And you agree that your books are accurate and truthful?

16 **A.** My books are accurate and truthful, yes.

17 **Q.** And you teach from them?

18 **A.** I teach from them, yes.

19 **Q.** Now, you just mentioned it was the static movement that
20 you were referring to in Chapter 10 in Paragraph 10.2,
21 Subsection 1, Sub-header C, correct?

22 **MR. WOHL:** Objection, your Honor. Vague and
23 ambiguous. Counsel referred to "static movement." That is a
24 non-sequitur.

25

1 BY MR. DOSTART:

2 Q. Standing for extended periods of time in a static posture,
3 is that what you were referring to in Chapter 10, Subsection
4 10.2, Subsection 1(C)?

5 A. Yes.

6 Q. And yesterday, Dr. Fernandez, you testified that cashiers'
7 blood would flow from their legs as a result of the muscle pump
8 from their movement, is that correct?

9 A. Flow from their legs?

10 Q. Flow from and to their legs?

11 A. I -- I did not use those words, but I -- what I did say
12 was the muscle pump will assist the blood from the legs to the
13 upper -- to the heart. That's what I did say.

14 Q. And I want to be clear. What would cause the muscle pump
15 to begin working?

16 A. When you move -- every time you step, every step you take,
17 the muscle's pump helps the muscles contract and expand in the
18 calf and so on, and it moves upwards, the muscle. The blood
19 moves upwards.

20 So every step you take is not static. It's dynamic. So
21 when I was talking about standing -- the example you gave of
22 "C," it's a static movement. There is no movement involved.

23 Q. Dr. Fernandez, what is required, in your opinion, to
24 alleviate the effects of prolonged standing?

25 A. I think I've said some of that in my book. There is

1 movement.

2 Q. Okay. I'm going to read from your book. Chapter 9,
3 Sub-header 9.7 is entitled "Standing Work." And I'll read from
4 it.

5 MR. WOHL: Excuse me, counsel. Can you give me a page
6 number?

7 MR. DOSTART: Page 137. I apologize.

8 BY MR. DOSTART:

9 Q. Page 137.

10 "Standing work is observed in industry. However,
11 ergonomists need to be aware that the two limitations
12 for standing for prolonged periods are venous blood
13 pooling and fatigue in the legs and back."

14 And you stand by that statement, Dr. Fernandez?

15 A. Yes.

16 Q. (As read)

17 "Venous blood pooling of the lower extremities leads
18 to swelling of the legs, edema and varicose veins.
19 To reduce venous blood pooling, active standing or
20 moving is suggested."

21 Do you stand by that statement, Dr. Fernandez?

22 A. Yes.

23 Q. The very next sentence in your book reads:

24 "Active standing is walking for two to four minutes
25 every 15 minutes."

1 Do you stand by that statement, Dr. Fernandez?

2 **A.** I've got a reference for that and that is Konz and
3 Johnson -- or Konz, I'm sorry. I shouldn't say Johnson.

4 Dr. Konz, it was a reference of a particular book, article that
5 he wrote.

6 **Q.** Dr. Fernandez, do you stand by the statement that active
7 standing is walking for two to four minutes every 15 minutes?

8 **A.** I gave an example of active standing.

9 **Q.** But your book doesn't give any other examples, does it?

10 **A.** It gives one example.

11 **Q.** Okay. Thank you.

12 In your opinion, Dr. Fernandez, do cashiers at Kmart walk
13 for two to four minutes every 15 minutes?

14 **A.** What they are doing is moving. They are not walking.
15 They are -- there is movement involved.

16 **Q.** Thank you, Dr. Fernandez.

17 Now, Dr. Fernandez, you did visit the Tulare Kmart store,
18 correct?

19 **A.** Yes, I did.

20 **Q.** And you spent some time in the store and watched some
21 videos?

22 **A.** I didn't watch the videos. I spent time at the stores and
23 later on I watched videos, yes.

24 **Q.** Okay. Did you notice the fatigue mats in the store?

25 **A.** Yes.

1 Q. Did you notice the condition of the fatigue mats in the
2 store?

3 A. When you say "condition," what do you mean, sir?

4 Q. What I mean by "condition" is, did you notice that the
5 fatigue mats had holes that were worn in the middle of the
6 fatigue mats?

7 A. I did not notice it.

8 Q. Did anyone else that you were there with, one of your
9 associates or an employee, notice it?

10 A. No.

11 Q. Did anyone mention it to you?

12 A. No.

13 Q. When you said, "I did not notice it," was there anyone
14 else that noticed it?

15 A. No.

16 MR. WOHL: Objection. Lacks foundation.

17 THE COURT: Well, the -- he's testified to other
18 things that his team did and he relied on. So if his team
19 reported that to him, he could testify to that.

20 MR. WOHL: That's fine, your Honor. It's just not the
21 way the question was phrased.

22 THE COURT: So did anyone from your team report to you
23 that there were holes in the mats?

24 THE WITNESS: No, sir.

25 THE COURT: All right. Go ahead.

1 **BY MR. DOSTART:**

2 **Q.** Dr. Fernandez, do you believe that holes worn in the
3 middle of a fatigue mat could be evidence that a cashier is
4 standing in one spot?

5 **A.** No. What --

6 **Q.** Dr. Fernandez -- I'm sorry.

7 **MR. WOHL:** Excuse me, your Honor. He's trying to
8 finish his response.

9 **THE COURT:** Please finish.

10 **A.** What it does, does state is the mat is worn out in that
11 particular place, it could be because a person is moving and
12 every time they step into it, they rub into it. That's what
13 could happen.

14 **BY MR. DOSTART:**

15 **Q.** Thank you. Dr. Fernandez, did you notice in some of the
16 videos that Kmart showed the Court yesterday that there were
17 not fatigue mats underneath the cashier?

18 **A.** It's possible. The videos are the videos. I did not set
19 up anything. It was -- I set up the cameras. My guy set up
20 the cameras and --

21 **THE COURT:** The question is: Did you notice one way
22 or the other whether any of the cashier stalls did not have a
23 mat? Is that something you noticed or did not notice? What
24 was your observation on that point?

25 **THE WITNESS:** I noticed mats in some of the locations.

1 I'm not -- I cannot specifically say I saw it in all -- in all
2 the videos because I was not looking for the mat in all the
3 videos.

4 So if I'm shown a video with no mats, I would not be
5 surprised.

6 **BY MR. DOSTART:**

7 **Q.** Okay. I'm sorry. I just want to be clear.

8 So were there instances yesterday, 24 hours ago in this
9 courtroom while you were watching videos shown to you by
10 counsel for Kmart, that you noticed that there were no fatigue
11 mats in the stall where the cashier was working?

12 **A.** I did not notice.

13 **Q.** Okay. Thank you.

14 Now, Dr. Fernandez, I want to speak with you a moment
15 about heavy items. You've indicated that a heavy item is an
16 item that weighs more than 10 pounds, correct?

17 **A.** Yes.

18 **Q.** Yesterday you testified that a heavy item was present on
19 average approximately once every 17 minutes during your study,
20 correct?

21 **MR. WOHL:** Objection, your Honor. Misstates the
22 testimony.

23 **A.** You're asking me to --

24 **THE COURT:** Well, I don't know. Okay. Repeat begin,
25 if you remember, what it is that you said yesterday on this

1 point?

2 And remember, now, yesterday that you said you made a
3 mistake about an item versus a percentage of time and so forth.
4 So be precise and accurate on whatever this is.

5 **THE WITNESS:** Yes, sir.

6 Did you say heavy items present? Heavy items -- the
7 number of heavy items that -- there are two numbers out here.
8 Number of --

9 **BY MR. DOSTART:**

10 **Q.** I said present.

11 **A.** Number of heavy items present is .19 -- sorry. 3.47.

12 **THE COURT:** What is that?

13 **THE WITNESS:** Number of heavy items present.

14 **THE COURT:** Per what?

15 **THE WITNESS:** Per hour, sorry.

16 **THE COURT:** Per hour?

17 **THE WITNESS:** Yes, sir.

18 **THE COURT:** Three point what?

19 **THE WITNESS:** Four seven.

20 **THE COURT:** Does that translate to 17 minutes? Is
21 that what we decided yesterday?

22 **MR. DOSTART:** It is, your Honor.

23 **THE COURT:** All right. So do you agree that counsel
24 stated it correctly?

25 **THE WITNESS:** Yes.

1 **THE COURT:** All right. Let's move on.

2 **MR. DOSTART:** Thank you, your Honor.

3 **BY MR. DOSTART:**

4 **Q.** And yesterday, Dr. Fernandez, do you remember the Court
5 noting that heavy items were present only once every 17
6 minutes, but were lifted once every 10 minutes on average?

7 **A.** Yes.

8 **Q.** Okay. And you explained that the reason for that seeming
9 disconnect is that you calculated the weight, the aggregate
10 weight of items that weigh less than 10 pounds placed into a
11 customer's bag and then characterized that bag as a heavy item,
12 correct?

13 **A.** Yes.

14 **Q.** Now, Dr. Fernandez, isn't it possible that cashiers could
15 be trained to not place too many items into one particular bag?

16 **A.** Yes.

17 **Q.** And you do believe that training for cashiers would be
18 beneficial, correct?

19 **A.** Yes. If --

20 **Q.** Yes?

21 **A.** If you notice the videos yesterday, some of them did not
22 do it. The way they bagged -- there were different ways of
23 bagging. Some of them would open the bag and then put one item
24 at a time. Some of them would go ahead and put a whole lot of
25 items at a time. It all -- they differed.

1 Q. And you agree that one of the reasons for training
2 employees is to make them aware of risks and to reduce the risk
3 of injury, correct?

4 A. Training helps, yes.

5 Q. And you agree -- and you, in fact -- strike that.

6 You have trained employees yourself, correct?

7 A. Yes.

8 Q. And the reason why you train employees, once again, is to
9 reduce risk, to reduce awkward postures, and to have the
10 employees perform from a better ergonomic perspective, correct?

11 (Brief pause.)

12 Q. Is that correct, Dr. Fernandez?

13 A. I'm trying to figure out if that's -- that's the global
14 objective of the ergonomic training that we perform and, yes,
15 that would be one of the major ones, yes.

16 Q. Okay. Furthermore, you do recommend that Kmart train its
17 cashiers to reduce the risk of injuries, correct?

18 A. That would not be the first mode of attack, but, yes, that
19 would be a mode of attack. You would engineer the problem out
20 first. That's what engineers -- that's what ergonomists do.

21 First you design it so that you don't -- you try to get
22 the hazard out. If you leave the hazard out there and leave it
23 for the employee to take care of it, then you're leaving the
24 employee at risk.

25 Q. Doctor, do you have an opinion one way or the other about

1 how often cashiers will perform tasks in a seated position
2 which they should be performing while standing?

3 A. I -- I do not know, but based on experience, there are
4 times when they should not be doing something and they do it.

5 Q. I want to talk for a moment now, Dr. Fernandez, about your
6 criticisms of Dr. Johnson's opinions.

7 A. Okay.

8 Q. First, you say that a seat would not fit in the current
9 work station, correct?

10 A. Yes.

11 Q. Okay. But you have no opinion on whether or not the work
12 station could be modified so that a seat would fit, is that
13 correct?

14 A. This...

15 (Brief pause.)

16 Q. I'll ask the question again, if you would like me to.

17 A. The seat cannot fit under the work station. It does not
18 matter what the work station looks like. You cannot go
19 completely under the seat.

20 Q. You cannot go completely under the seat. I'm slightly
21 confused by that answer. Would you please clarify your answer?

22 A. An ergonomically designed seat has a back rest.

23 Q. Okay. Let me ask that question again, Dr. Fernandez. I
24 think we're not tracking each other.

25 My question was: Dr. Fernandez, you have no opinion on

1 whether the work station could be modified so that a seat would
2 fit. Is that true, that you have no opinion whether the work
3 station could be modified so that a seat would fit?

4 **A.** I'm not trying to avoid your answer. I'm just a bit
5 confused of the question.

6 So could you rephrase it, please? Because the seat part
7 of it is just throwing me off.

8 **Q.** Okay. I'm going to read from your deposition transcript
9 in this case taken on Thursday, October 4th, 2012 from
10 Page 138, Lines 5 to 11.

11 **"QUESTION:** No. We're talking about the existing work
12 station. Do you have an opinion whether there could
13 be modifications that you could make to the existing
14 work station that would allow a seat to fit?

15 Objection, lacks foundation, incomplete hypothetical.

16 **"ANSWER:** That's not what I looked at. Modifications,
17 I did not look at the modifications. I have not
18 thought this through."

19 Do you stand by that statement?

20 **A.** About modifications? Yes. I've not -- I've not thought
21 it through and that's what I mentioned to, your Honor
22 yesterday.

23 **Q.** Okay. And so is it true that you have not considered any
24 possible modifications to the Tulare work station?

25 **A.** I have not.

1 Q. Next you criticized Dr. Johnson because you say a seated
2 cashier wouldn't have enough leg room, is that true?

3 A. Yes.

4 Q. But you agree that if the shelves and other items
5 underneath the counter were removed, that there would be enough
6 leg room, is that correct?

7 A. There could be leg room and there could not at all,
8 depends on the design.

9 Q. Okay. I'm going to read from your deposition taken on the
10 same day, October 4th, 2012, from Page 138, Line 20 to 139,
11 Line 3.

12 "QUESTION: And you would agree that you could provide
13 for enough leg room if you removed the shelves
14 underneath the counter?

15 "Objection. Overbroad. Lacks foundation, incomplete
16 hypothetical."

17 "ANSWER: If you remove the shelves and all the
18 machinery and whatever paraphernalia that you would
19 have under the shelves, under the counter, you would
20 possibly get enough of high clearance."

21 A. I stand by that.

22 Q. Thank you, Dr. Fernandez.

23 Next, Dr. Fernandez, you say that if cashiers performed
24 their job from a seated position, that they might move their
25 neck and shoulders more, is that correct?

1 A. The shoulders for sure.

2 Q. But you have no idea whether this additional movement
3 would be harmful, do you?

4 A. It would increase the number of shoulder movements,
5 increase -- it would be below the trigger, which ergonomists
6 don't have -- when I say "trigger," what is the limit.

7 But if the numbers increase, if the numbers increase, it
8 will increase the risk.

9 Q. Okay. But you have no idea whether this additional
10 movement would be harmful, do you?

11 A. As I mentioned, I said that it will increase the risk.

12 Q. Okay. But it may not be harmful?

13 A. It might. It might not be.

14 Q. And you've done no studies in this case to find out
15 whether the neck and shoulder movement of a seated cashier
16 would rise to a harmful level, have you?

17 A. I've done no study in this particular situation, no.

18 Q. And it's true that ergonomists do do studies in order to
19 find out whether neck and shoulder movements are or are not
20 harmful, isn't it true?

21 A. Yes, we do studies. We need mock-ups and that's what we
22 do, yes.

23 Q. But you did not do one in this case, did you?

24 A. I did not, no.

25 Q. But you could have, couldn't you?

1 A. If I knew what the modifications were, I could.

2 Q. Next you say that:

3 "A seated cashier would perform more extended reaches
4 than a standing cashier."

5 Correct?

6 A. Yes.

7 Q. But you can't quantify how many more extended reaches a
8 seated cashier would make versus a standing cashier, correct?

9 A. I cannot quantify, but it would increase the extended
10 reaches. It would increase the biomechanical forces and
11 movements and it would increase the risk.

12 Q. But you can't quantify that, correct?

13 A. An increased risk. I cannot quantify it. I can tell you
14 it's increased.

15 Q. And you have no idea whether the number of reaches a
16 seated cashier would make would be harmful to that seated
17 cashier, correct?

18 A. It would be harmful to some of them and it will not be
19 harmful to others because they have not reached that limit,
20 that trigger point for them.

21 Q. But you don't know whether it would be harmful?

22 MR. WOHL: Objection, your Honor. Asked and answered.

23 A. Sir, there is no ergonomist who is going to give you a
24 number and says: This person will break with this -- with this
25 risk factor.

1 BY MR. DOSTART:

2 Q. Okay. But you do agree that if Kmart installed a conveyor
3 belt at each cash register -- at each cash register station in
4 Tulare, that that would reduce the number of extended reaches,
5 correct?

6 A. It would reduce the number of extended reaches.

7 Q. Next, Dr. Fernandez, you say that:

8 "A seated cashier can't reach as far as a standing
9 cashier."

10 Correct?

11 A. Yes.

12 Q. But isn't it true, Dr. Fernandez, that in your book you
13 say that the maximum reach distance for a seated female
14 employee is 23.5 inches?

15 A. Yes. That's the maximum work area, yes.

16 Q. And the maximum reach distance for seated male employees
17 is 26.5 inches, is that correct?

18 A. That's right.

19 Q. And then, according to your September 6th, 2012 report, on
20 Page 10, Label c -- which we also have now on Exhibit 216-A --
21 the reach from across the counter, from where the cashier is to
22 where the customer is, is 23 inches, correct?

23 A. Is 23 inches.

24 Q. Which is less than the maximum reach for a seated female
25 or a seated male employee, correct?

1 A. That's right, but that's --

2 Q. Finally -- I'm sorry.

3 A. But that's not the way ergonomists design.

4 Q. Okay.

5 A. That's the difference. The difference here is that you're
6 using -- if you read further on in my book, it says very
7 clearly: Design within the normal working area.

8 Q. Dr. Fernandez -- I'm sorry. Go ahead.

9 A. And normal working area is not the 23 for the females and
10 not 26 for the males. And so if they are going to reach out,
11 it's going to cause problems.

12 And -- and that's one of the reasons why I teach in a
13 classroom and not just give this book out to cause problems.

14 Q. Finally, Dr. Fernandez, you say that there would be a risk
15 that the cashier would trip getting on and off a seat, is that
16 true?

17 A. Yes.

18 Q. You understand that Dr. Johnson is recommending a seat
19 that is approximately 24 to 28 inches high, is that true?

20 A. Yes.

21 Q. And a regular seat is approximately 21 to 22 inches high,
22 is that true?

23 A. No, that's not true. It goes all the way down to 19
24 sometimes.

25 Q. Okay. I'm going to read from Page 129 of the same

1 deposition, October 4, 2012, Lines 19 through 24.

2 **"QUESTION:** All right. In the next section of your
3 report you talk about the consequences of introducing
4 a high seat. What do you mean by a "high seat"?

5 **"ANSWER:** A high seat, anything that's more than
6 21 inches, 22 inches. A regular seat is about 21 or
7 22 inches max. Beyond that is a high seat."

8 Do you stand by that statement?

9 **A.** 21, 22 max, I said. I didn't give you a lower number.

10 **Q.** "A regular seat is about 21 or 22 inches."

11 Do you stand by that statement?

12 **A.** Yes, I do.

13 **Q.** Okay. So the seat that Dr. Johnson is proposing is only
14 three to seven inches taller than a regular seat, is that
15 correct?

16 **A.** Depending on who's using it. Depending on who's using it.

17 **Q.** Well, my question, Dr. Fernandez, is: Is the seat that
18 Dr. Johnson is proposing approximately three to seven inches
19 taller than a regular seat?

20 **A.** If you're talking about the seat in isolation, the answer
21 is yes.

22 **Q.** Thank you.

23 And you are not aware of any ergonomic studies that say
24 that higher seats are more unstable than lower seats, are you?

25 **A.** There are studies that say that high stools are unstable

1 that have back rests. And that's what Kroemer said.

2 But if you're asking me about high seats, there is no
3 studies that have been done. But one does note that as the
4 weight increases higher on, the stability, the center of mass
5 is going to increase. When center of mass gets higher, the
6 chances of it toppling over is small.

7 **Q.** So your testimony here today is that there are studies
8 that indicate that high stools are unstable?

9 **A.** Mentioned Kroemer, and that's what you asked me in the
10 depo as well.

11 **Q.** I'm going to read from Page 148 of your deposition
12 transcript taken on October 4th, 2012 from Lines 14 through 16:

13 **"QUESTION:** Are you aware of any studies that have
14 been done about high stools being unstable?

15 **"ANSWER:** No."

16 Dr. Johnson, isn't it true that you have --

17 **THE COURT:** Wait, wait.

18 **MR. DOSTART:** Excuse me. Dr. Fernandez.

19 **THE COURT:** Correct.

20 **MR. DOSTART:** So I have his name right next to it.

21 **BY MR. DOSTART:**

22 **Q.** Dr. Fernandez, is it true that you do not have a basis for
23 quantifying what the supposed risk is of tripping over this
24 seat?

25 **A.** I do not have the -- I do not know how much the risk would

1 increase, yes.

2 Q. Okay. Now, you've mentioned this Lehman article. Is it
3 true in the Lehman study her experiments only contain 10
4 participants?

5 A. Yes.

6 Q. And is it true that she compared the percent of maximum
7 voluntary contraction for seated versus standing cashiers?

8 A. Yes.

9 Q. Is it true take maximum voluntary contraction is a measure
10 of exertion of the muscle?

11 A. Yes.

12 Q. Is it true that Lehman found that for both seated and
13 standing cashiers, the maximum voluntary contraction was less
14 than 15 percent?

15 A. Yes.

16 Q. And isn't it true that your own book states that:

17 "When maximum voluntary contraction is less than
18 15 percent, that it's not harmful."

19 A. Yes. It's based on her study, yes.

20 Q. And isn't it true that Lehman did not find that the
21 maximum voluntary contraction from seated cashiers was at a
22 harmful level?

23 A. Based on her study, yes.

24 Q. And isn't it true that Lehman also found that the
25 cashiers, the majority of the cashiers in that study preferred

1 being seated to standing?

2 **A.** She did say that and then later on in the article itself
3 she went ahead and said she was not quite sure what would
4 happen if they knew the risk --

5 **Q.** Okay. And --

6 **A.** (Continuing) -- was higher for the upper extremities and
7 if they knew that, what would have happened. That's what
8 Lehman said in that article.

9 **Q.** Wasn't the focus of the article a maximum voluntary
10 contraction?

11 **A.** No, it was not. It was a comparison. That's just one of
12 the comparisons. You're picking up just one, sir.

13 **Q.** Okay. I'm going to go to the Yates article. You cited
14 the Yates article for the proposition that lifting while
15 sitting is more harmful than lifting while standing, correct?

16 **A.** That's right.

17 **Q.** Now, in the Yates study do you remember what weight the
18 participants were lifting?

19 **A.** Thirty-five pounds.

20 **Q.** Do you have any idea what percentage of products at Kmart
21 weigh more than 35 pounds?

22 **A.** Very few.

23 **Q.** In any event, don't you agree that a cashier faced with a
24 35-pound item could use the hand scanner to scan it?

25 **A.** They could. We saw -- we saw in some videos yesterday

1 that some of them preferred doing it in a particular way.

2 Others did it in another way.

3 Q. As an expert ergonomist, Dr. Fernandez, do you agree that
4 it's important for you to review all relevant articles before
5 you reach your opinions?

6 A. I try to read as many articles as I can that are relevant.

7 Q. Is it true that you were the editor of the "International
8 Journal of Industrial Ergonomics"?

9 A. Yes.

10 Q. Isn't it true that while you were an editor of that
11 journal, an article was published by Dr. Shinnar?

12 A. Yes.

13 Q. Isn't it true that the article was entitled "Survey of
14 Ergonomic Features of Supermarket Cash Registers"?

15 A. Yes.

16 Q. Are you aware that Dr. Shinnar's finding was that, and I
17 quote:

18 "Work stations should ideally accommodate both the
19 sitting and standing positions as sitting and
20 standing imposes stresses on different muscles. An
21 adjustable sit/stand seat would allow the cashier to
22 alternate positions and relax the alternate muscle
23 group."

24 Are you aware that's his finding?

25 A. Yes. His sit/stand is not an alternative between sitting

1 or standing. His is a high stool. That's what he's
2 recommending.

3 Q. Similar to what Dr. Johnson is recommending?

4 A. No.

5 Q. Dr. Fernandez, why did you not consider that article when
6 rendering your opinions in this case?

7 A. He has said, use a sit/stand. He's talking about the
8 ideal situation again.

9 Q. I would like to ask that question again.

10 Dr. Fernandez, why did you not consider that article which
11 was published in a journal of which you were the editor when
12 you were issuing your opinions in this case?

13 A. I did not consider it because it was, one, a grocery
14 store. The tasks were different. It was based on whether it
15 met OSHA requirement or not. That's what it was.

16 Q. Okay.

17 A. And in the end he did say alternate between sitting and
18 standing. That's not very different from all the others.

19 He's basing his opinions, rightfully so, on the
20 constraints of what he's looking at. I'm basing my opinions --
21 I did a literature review. I'm basing my opinions on the
22 constraints, what the tasks are being performed here.

23 Q. Dr. Fernandez, I'm going to ask you about another article
24 that was published in the "International Journal of Health
25 Services," volume 35, No. 4, pages 745 through 763. And it is

1 by a Dr. Karen Messing. And the title of the article is:

2 "Standing still: Why North American Workers Are Not Insisting
3 On Seats Despite Known Health Benefits."

4 Dr. Fernandez, did you consider this article when issuing
5 your opinions in this case?

6 A. I did not.

7 Q. Why not?

8 A. I have not come across that article.

9 Q. Dr. Fernandez, I'm going to ask you about another article.
10 This is an article that was published in "Applied Ergonomics."

11 Do you agree that "Applied Ergonomics" is a treatise or a
12 publication that's authoritative in your field?

13 A. Yes.

14 Q. This is an article -- this is an article published by
15 Dr. Spielholz, S-p-i-e-l-h-o-l-z, and it's in "Applied
16 Ergonomics," Volume 39 in 2008. It's entitled: "Field
17 Evaluation of a New Grocery Check Stand Design."

18 Did you consider this article when you were issuing your
19 opinions in this case?

20 A. Sir, I was not looking at grocery stores because their
21 constraints are different. The tasks are different.

22 I was looking in general about sitting and standing and
23 when you're looking in general about sitting and standing,
24 you're looking at the task being performed. That's what I
25 looked at.

1 And there are many articles out there. There are articles
2 on grocery stores that are not -- that are not comparable. I
3 was looking at general articles.

4 Q. I'm going to ask you about another article published in
5 "Ergonomics." Is "Ergonomics" an authoritative publication in
6 your field?

7 A. Yes.

8 Q. This article was published in 1989, Volume 32, No. 4,
9 Pages 359 through 371. It's published by Dr. Anthony Ryan.
10 It's entitled, "The Prevalence of Musculoskeletal Symptoms in
11 Supermarket Workers."

12 Are you familiar with this article?

13 A. You asked me about it yesterday.

14 Q. And did you consider this article when rendering your
15 opinions in this case?

16 A. I reviewed the article now, but when I was -- when I wrote
17 my report, no.

18 Q. Okay. I'm going to ask you about another article
19 published in the "Journal of Work Environmental and Health" in
20 1992 --

21 **THE COURT:** Let's just be clear. None of these
22 articles are in evidence. You haven't moved them into
23 evidence. I'm not certain they could even be received in
24 evidence.

25 But just in case you have a different view of it, I want

1 to make sure, what -- why are we even going through these
2 articles?

3 **MR. DOSTART:** Your Honor, I agree with your Honor.
4 I'm not going to try to move these into evidence.

5 I want to confirm -- a lot of these articles were shown to
6 Dr. Fernandez three times and I want to make sure that at his
7 first deposition when -- in the Rite Aid case, he didn't
8 consider them. And then he was asked again if he considered
9 many of these articles in his first deposition in this case.
10 And then he was asked again if he considered them in his second
11 deposition in this case and he never considered them. And in
12 fact --

13 **THE COURT:** You haven't gone through that drill, Rite
14 Aid, the other -- that sequence. How are you going to prove
15 any of that up?

16 **MR. DOSTART:** I have his deposition transcripts, your
17 Honor.

18 **THE COURT:** You're going to read that in or something?
19 I mean, you just can't wait -- if you're going to do that, I
20 guess you could try that.

21 But here is the thing. You can't wait until the record is
22 closed and say: Oh, judge, I forgot to put the Rite Aid part
23 in where he was asked about it.

24 You see the point?

25 **MR. DOSTART:** I do, your Honor.

1 **THE COURT:** You haven't proved up -- you've explained
2 the way you want to try to use it, but none of that's been
3 proven for any of these articles.

4 You haven't gone back to the Rite Aid deposition and
5 said -- read that question and so forth.

6 So I just bring this to your attention to deal with it in
7 the way that you wish, but I don't want there to be some
8 misapprehension as to what comes in or does not come into
9 evidence.

10 So enough said by me. You proceed as you wish.

11 **MR. DOSTART:** Thank you, your Honor.

12 **BY MR. DOSTART:**

13 **Q.** Dr. Fernandez, were you presented the article by Dr. Ryan
14 during your Rite Aid deposition?

15 **A.** Yes.

16 **Q.** And is it true that you did not consider it when issuing
17 your opinions in that case?

18 **A.** Yes.

19 **Q.** Is it true that you were presented this article again in
20 your Kmart deposition, in your first deposition in this case?

21 **A.** Yes.

22 **Q.** Is it true that you were presented with this article again
23 in your second deposition in this case?

24 **A.** It was not presented. We discussed it.

25 **Q.** And have you considered this article?

1 A. In my reports? No.

2 Q. Why not?

3 A. Because the tasks are different, and I said that yesterday
4 as well.

5 Q. In the "Journal of Work and Environmental Health," there
6 is an article by Dr. Tushsen, T-u-s-h-s-e-n, entitled "Standing
7 at Work and Varicose Veins."

8 Did you consider this article when issuing your opinions
9 in this case?

10 A. No.

11 Q. Dr. Fernandez, you have been to the Tulare Kmart store?

12 A. Yes.

13 Q. You've walked around the store?

14 A. Yes.

15 Q. You've walked around the aisles full of merchandise?

16 A. Yes.

17 Q. Would you agree that there are thousands of different
18 products sold at Kmart in Tulare?

19 A. Yes.

20 Q. Have you heard of T-Logs?

21 A. T-Logs?

22 Q. Yes.

23 A. No.

24 Q. Have you heard of T-Log extract data?

25 A. No.

1 Q. Have you heard of market-based reports?

2 A. Yes.

3 Q. What are those?

4 A. Reports you obtained -- I've heard of them. Have I ever
5 seen them? Have I analyzed them? The answer is no.

6 Q. So Kmart did not provide any of that information to you?

7 A. No.

8 Q. Did Kmart provide any transaction level information to for
9 you to issue your reports in this case?

10 A. No.

11 Q. Okay. I would like to turn to your September 6th report.
12 And we'll go to Table 3, which is on Page 12 of the report.

13 I forget the pagination as far as the Exhibit No. goes.

14 MR. WOHL: I think it's Exhibit 213-14.

15 BY MR. DOSTART:

16 Q. Exhibit 213-14.

17 And, Dr. Fernandez, my question is: If you go to the row
18 entitled "Heavy Items Present" as we discussed this morning, it
19 states that:

20 "There are present 3.47 times per hour on average."

21 Correct?

22 A. Yes.

23 Q. And then beneath that is "Heavy Items Lifted." And that
24 is 6.07 times per hour on average, is that correct?

25 A. Yes.

1 Q. And as we discussed this morning, the reason for the
2 seeming disconnect is because you added up the weights of items
3 placed in a customer's bag and then determined which items
4 weigh more than 10 pounds, is that correct -- excuse me, which
5 bags weigh more than 10 pounds?

6 A. Yes.

7 Q. Okay. And the item weights that you took -- strike that.
8 And the item weights that you used in order to calculate
9 the total weight of a customer's bag, you took from the table
10 in your report that has the list of items and the list of item
11 weights, is that correct?

12 A. That's right.

13 Q. Let me find that table. Do you remember which table it
14 is, Dr. Fernandez? I had it marked. Here it is. It is
15 Appendix E-1.

16 A. Yes, sir.

17 Q. Which --

18 A. I'm sorry. Sorry.

19 Q. It should be E-1, which is Page 29 of your report.

20 A. Yes.

21 Q. Okay.

22 A. Appendix E.

23 Q. Now, do you have any idea how many items are on that
24 chart?

25 A. I don't. How each of the transactions that were

1 performed, 537 transactions, whenever there was a heavy item,
2 it was identified and if there was a group of items we went and
3 identified it and it was all produced.

4 Q. We're going to get into this in a lot of detail, so I want
5 to be very, very clear here.

6 A. Okay.

7 Q. This chart contains 72 items?

8 A. Okay.

9 Q. Were there any other charts that your associates or you
10 relied on for the weights of items that the cashiers scanned
11 during your video analysis of the Tulare store?

12 A. I'm not aware.

13 Q. Okay. So you testified that there are thousands of
14 products at Kmart, correct?

15 A. Right.

16 Q. And Appendix E-1 contains 72 products, correct?

17 A. If you're asking me, sir, that if -- are these the global
18 list that was used and whether -- you know, if you had -- if
19 you had jeans and you had seven pair of jeans and you put it in
20 a bag and whether it would weigh more than 10 pounds and
21 whether it was in this list, the answer most probably is going
22 to be no.

23 Q. I don't understand that, but I want to. So let's go piece
24 by piece.

25 What I want to understand is very specifically how you

1 trained your associates and how you personally, when watching
2 the video, were able to identify which product was being
3 purchased, how much it weighed, and in which bag it went?

4 And I want to know how you knew when those bags weigh more
5 than 10 pounds.

6 Please explain that to the Court.

7 **MR. WOHL:** Objection, compound. Misstated.

8 **THE COURT:** Overruled. Please answer.

9 **A.** When were the bags -- each of the bags if they had
10 multiple items, we went ahead and identified what we estimated
11 were the items and the weights.

12 **BY MR. DOSTART:**

13 **Q.** You estimated?

14 **A.** Yes.

15 **Q.** And how did you do that estimation?

16 **A.** By look. Whatever we could see.

17 **Q.** Okay.

18 **A.** And that is why it was documented. If there was doubt,
19 somebody could go ahead and review it and disagree with items.

20 **Q.** Where is that doubt expressed in your report?

21 **A.** The doubt?

22 **MR. WOHL:** Objection, your Honor. Misstates the
23 evidence. He didn't say he had doubt.

24 **THE COURT:** What do you mean by "doubt"?

25 **THE WITNESS:** If the opposing side or someone else

1 disagreed with what we meant, there was doubt with our numbers,
2 you could disagree with it. That's what I meant by "doubt."
3 Not doubt on our part.

4 **THE COURT:** All right. Please continue.

5 **BY MR. DOSTART:**

6 **Q.** Dr. Fernandez, let's be very careful here.

7 Now, were you provided the same quality of video that's
8 been shown to this Court, that's been provided to plaintiff's
9 counsel?

10 **A.** Yes.

11 **Q.** Okay. So what we're going to do now is we can start the
12 clip. We're going to start a 15-minute clip. And I would like
13 you to identify for me what item is being purchased and how
14 much it weighs, okay?

15 **A.** I don't think I can do that because we did that in slow
16 motion.

17 **Q.** I'm sorry?

18 **A.** When yeah did that --

19 **Q.** We'll run it in slow motion.

20 **A.** We did that in slow motion, one.

21 **Q.** We'll run it in slow motion.

22 **MR. WOHL:** Your Honor, could Mr. Dostart please show a
23 little courtesy to the witness and allow him to answer before
24 he keeps --

25 **THE COURT:** All right. Finish the answer about slow

1 motion.

2 **A.** I would like to see my data sheets as well. I had data
3 sheets for each of these and you were provided those data
4 sheets.

5 **BY MR. DOSTART:**

6 **Q.** We were not provided with data sheets?

7 **A.** Yes, you were, sir.

8 **Q.** That had weights of products?

9 **A.** Basically, sir, in my deposition we walked you through and
10 you asked me -- you got them on CDs in my first deposition --
11 sorry, in the...

12 In my second deposition you got all these in CDs with all
13 the -- all you asked, the backup. When you asked for
14 production, you asked for -- it was spreadsheets.

15 **Q.** We're going to watch the data in slow motion, as you
16 indicated, so you can identify the weights of each product.

17 **MR. WOHL:** Your Honor, I guess he can do whatever he
18 wants to do, but Dr. Fernandez has already explained the
19 methodology they used. And I think to put him on the stand,
20 however slowly they are going to do it, is kind of a futile
21 exercise because, obviously, there was a lot of care taken in
22 looking and stopping and trying to figure out and so forth.

23 So this is not going to be illustrative of what the actual
24 video shows.

25 **MR. DOSTART:** We would disagree very strongly with

1 that, your Honor.

2 **MR. WOHL:** They are free, if they want, to make their
3 own proffer what the video shows. That's fine, but to put him
4 through this exercise seems to me misleading. It's --

5 **MR. DOSTART:** It's not our video.

6 **MR. WOHL:** Can I finish before you interrupt?

7 Unfair and misleading, your Honor. It's not the
8 methodology was used.

9 Dr. Fernandez didn't just do this on the witness stand in
10 15 or 30 minutes. They had a whole team looking at these
11 videos very carefully in slow motion. This is an unfair
12 exercise and I object.

13 **THE COURT:** Do you have here the crib sheets that he
14 had that were used, or whatever those documents were that were
15 used to help estimate the weights so he could do it on the fly
16 here?

17 **MR. DOSTART:** Let me ask this to Dr. Fernandez.

18 **BY MR. DOSTART:**

19 **Q.** Dr. Fernandez, the crib sheets that you provided us, isn't
20 it true that they did not contain the weights of products?

21 **A.** It told you what the products were.

22 **Q.** How did you get that information?

23 **A.** Those were what we estimated those products were.

24 **Q.** So it didn't tell you what the products were. It told us
25 what you estimated the products were, is that correct?

1 A. That's right.

2 Q. And they were one of the 72 items listed on Appendix E-1,
3 is that correct?

4 A. No. I'm saying that you had a sheet for each transaction,
5 for each 537 transactions. You would -- you had each of those
6 and it told you the number of foot movements. It told you if
7 they were weight lifted and what weights were lifted in each of
8 those transactions. And that was -- that was produced to you.

9 Q. Did you bring your file with you here today?

10 A. No.

11 Q. How did you estimate the weights of the products that were
12 being purchased?

13 A. How did we estimate? Partially from this list.
14 Partially -- pair of jeans. If jeans was not on the list, we
15 estimated. If there were four jeans or ten jeans.

16 Q. That's my question to you: How did you estimate it? Did
17 you Google it?

18 A. My guys Googled it. They went ahead and weighed some of
19 it, yes.

20 Q. Is that a scientific process, Dr. Fernandez?

21 A. A scientific process is you collect information.

22 Q. Couldn't you have asked Kmart for that information?

23 A. They did not provide me with that information.

24 Q. That wasn't my question, Dr. Fernandez.

25 Could you have asked Kmart to provide you with the weights

1 of the product that you were measuring?

2 **A.** I could have.

3 **Q.** Why didn't you?

4 **A.** Because I was not aware that they had that kind of
5 information in that kind of detail.

6 **MR. DOSTART:** With the Court's permission, your Honor,
7 we think it's very important to the credibility of this witness
8 if we show a tape and we have Dr. Fernandez, in his opinion,
9 estimate the weights of products and the weights of bags that
10 are being handed to the customers. It's a fundamental
11 important issue in this case.

12 **MR. WOHL:** Your Honor, again, what we're talking about
13 is we would have to put the video slow motion, even freeze
14 frame. He would then have to make careful notes of everything
15 he saw. He would then have to cross reference whatever chart
16 or document he has with weights, and that's simply not
17 necessary to put that witness through this for whatever point
18 they are trying to make.

19 **THE COURT:** Mr. Wohl, this is cross-examination. You
20 don't get to control what counsel does on cross.

21 But I say to Mister --

22 **MR. DOSTART:** Dostart.

23 **THE COURT:** (Continuing) -- Dostart, provide the
24 witness with the crib sheet that went with the segment you want
25 to show. He says he gave that to you at the deposition.

1 So you give him that, and I will let you do -- we'll at
2 least try it and see how much time it takes.

3 **MR. DOSTART:** Which deposition was it, Dr. Fernandez?

4 **THE COURT:** How do I know?

5 **MR. DOSTART:** I'm sorry. Dr. Fernandez. I'm sorry,
6 your Honor. Sorry.

7 **THE COURT:** Go ahead. Do you know what deposition you
8 gave --

9 **THE WITNESS:** The second deposition I just produced to
10 you. It was on CDs, on CDs.

11 **THE COURT:** The document, the sheet that had the list
12 of what goods were involved was done on a CD or was it done in
13 hard copy?

14 **THE WITNESS:** It was done, sir, on a spreadsheet and
15 copies of those spreadsheets were provided to you.

16 **MR. DOSTART:** Okay. Your Honor, here is the
17 fundamental issue. We don't have copies of these spreadsheets
18 here in court today.

19 **THE COURT:** Well, why -- he's saying he needs those in
20 order to do -- to be able to answer your question.

21 **MR. MATTHEW RIGHETTI:** Your Honor, may I have a
22 second?

23 **THE COURT:** Yes.

24 **MR. MATTHEW RIGHETTI:** Thank you.

25 (Discussion held off the record amongst

1 plaintiff's counsel.)

2 **MR. DOSTART:** We'll take this -- we'll make this a
3 little bit easier. Instead of having Dr. Fernandez testify to
4 his estimate of the weights of the product, what we'll do is
5 we're going to show the Court a 15-minute video clip, as
6 requested last Friday, as Kmart did yesterday and we'll simply
7 have Dr. Fernandez identify the product being purchased.

8 That's the -- that has to be done. That doesn't take a
9 crib sheet. That just takes eyes and the ability to see the
10 video.

11 So, and the testimony is that it's the same quality of
12 video that's been shown in court --

13 **THE COURT:** Well, I will allow you to do this within
14 reason. But what you're proposing to do is stop and start it
15 and that's going to take more than 15 minutes.

16 We'll go down this path for awhile until I feel we've
17 exhausted its utility.

18 **MR. DOSTART:** Completely understood, your Honor.

19 **THE COURT:** All right. So you go ahead.

20 And it will be useful to this as an illustration so the
21 witness can more carefully explain the process that was used to
22 estimate these weights. At a minimum it will be useful to do
23 that.

24 So the witness can talk while it's going, all right?

25 **MR. DOSTART:** I prefer that the witness only respond

1 to the questions that I ask.

2 **THE COURT:** Well, then -- or maybe that I ask. All
3 right. So --

4 **MR. DOSTART:** Of course, your Honor.

5 **THE COURT:** So read into the record what we're about
6 to see.

7 **MR. DOSTART:** We're going to be watching a video that
8 was taken from the same day that Kmart showed video from last
9 week, which is August 8th -- excuse me, August 7th, 2012 at
10 12:01 p.m., and we'll hit Play.

11 **MR. WOHL:** They should recite the file number, as we
12 did, your Honor.

13 **MR. DOSTART:** And the file number is 111_02_R.

14 **MR. WOHL:** I think that's just the dates.

15 **MR. DOSTART:** Okay. And we're ready to hit Play.

16 **THE WITNESS:** Just one second.

17 **MR. WOHL:** I'm sorry.

18 (Brief pause.)

19 **MR. DOSTART:** Okay. Ready to hit Play, Dr. Fernandez.

20 **MR. WOHL:** Give him a chance.

21 **THE COURT:** Wait, wait, wait. Do you have something
22 in your report that may tie into this segment that we're about
23 to see.

24 **THE WITNESS:** I have -- I have something on here that
25 says, this is -- this is one of the AVI files you got. This is

1 one of the 30 files?

2 **MR. DOSTART:** Correct.

3 **THE COURT:** Do you have something in your report that
4 bears on this segment?

5 **THE WITNESS:** No, sir. That's what I analyzed. I
6 wasn't quite sure if this is one that I analyzed or not.

7 **THE COURT:** Was it or not?

8 **THE WITNESS:** It is. It is.

9 **THE COURT:** Is there anything in your report on this
10 segment?

11 **THE WITNESS:** No, sir.

12 **THE COURT:** All right. So we -- for the record, we
13 have the angle view of a cashier assisting a customer, and
14 we're going to start rolling the tape, and we'll just roll the
15 tape til somebody asks a question.

16 So please start.

17 **MR. WOHL:** Your Honor, why don't they show both views?

18 **THE COURT:** Well, then we -- if we show both views,
19 then the scene is going to be so much smaller. I don't see
20 how -- then it's harder to see what the object is.

21 **MR. WOHL:** But the problem is with this angle view,
22 sometimes the cashier is blocking the view because the angle --
23 the camera is behind the cashier. While if it's a bird's eye,
24 then it's straight down.

25 This is going to be an unfair exercise because this is not

1 how his staff reviewed the --

2 **THE COURT:** Let's ask the question. You're the one
3 being put on the spot. Would it be better for you to see the
4 overhead view or the side view?

5 **THE WITNESS:** Both the views, sir. That's how my team
6 analyzed it and that's how I viewed it.

7 **THE COURT:** On the same screen?

8 **THE WITNESS:** On the same screen.

9 **THE COURT:** Can you do that, Mr. Dostart?

10 **MR. DOSTART:** Unfortunately, we're not Winston Strawn
11 and Paul Hastings. We don't have two IT people in the
12 courtroom that can do this for us.

13 We're happy, though, to only ask questions about products
14 that are in the main view of Dr. Fernandez on the big screen.

15 So I do agree with the Court's thought that if you put two
16 photos on the same screen, the products will be even smaller.
17 I think it might actually be more difficult to identify the
18 products, particularly if I agree not to ask about products
19 that are not in the plain view of Dr. Fernandez.

20 **MR. WOHL:** But, your Honor, this just demonstrates
21 further the futility of this exercise. What they are trying to
22 do, obviously, is get Dr. Fernandez to say something that
23 appears to be inaccurate or inconsistent with his report.

24 But the problem is they are not giving him a full and fair
25 opportunity to replicate exactly the inspection of these items

1 as his team did.

2 So this is a ridiculous exercise. This is not in any way
3 probative of anything. This is a "gotcha" kind of exercise,
4 your Honor, and it's not fair and I continue to object.

5 **MR. DOSTART:** Mr. Wohl is right. Let's show the tape
6 they showed yesterday, two screens and the whole nine yards.
7 Whatever Mr. Wohl showed yesterday.

8 **THE COURT:** We'll do that then.

9 **MR. WOHL:** Fine. So you pick which one you want. The
10 15-minute one?

11 **MR. DOSTART:** Yes, please.

12 **MR. WOHL:** Your Honor, just so we're clear. Before
13 they go in and showing their own 15-minute tape, this is the
14 15-minute tape --

15 **MR. DOSTART:** That is not true. We're not going to go
16 through the whole 15 minutes of this tape. We're just going to
17 go through enough to make the point. Then we're going to show
18 our own 15-minute tape. There will be no stopping when we show
19 our 15-minute tape; no pausing, no stopping.

20 **THE COURT:** So who has the one that was shown
21 yesterday?

22 **MR. WOHL:** So we can reproduce the one that was showed
23 yesterday.

24 (Discussion held off the record amongst
25 counsel.)

1 **THE COURT:** Why don't you just -- you have one that
2 was split screen that you can show.

3 **MR. DOSTART:** There is one that's up, your Honor.

4 **THE COURT:** All right. Identify for the record what
5 it is.

6 **MR. DOSTART:** This is a videotape taken on August 8th,
7 2012 shown by Kmart yesterday in the direct examination of Dr.
8 Fernandez, and it is at 2:29 p.m., and we can hit Play.

9 **THE COURT:** Go ahead. Start rolling it.

10 (Videotape played in open court.)

11 **BY MR. DOSTART:**

12 **Q.** All right. Dr. Fernandez, please identify the products
13 that are right now placed on the counter?

14 **A.** I can't identify them the way it is at the moment.

15 **Q.** Okay. We'll wait until they are moved.

16 **A.** We only identified them -- we all tried to identify them
17 when there were multiple. And then we backed up, stopped and
18 worked our way backwards, if they were multiple.

19 **Q.** Okay. We'll only identify them when they are multiple.

20 **THE COURT:** What is that thing that just --

21 **THE WITNESS:** Those are rugs. There are quite a few
22 rugs.

23 **BY MR. DOSTART:**

24 **Q.** Okay.

25 (Video continues.)

1 A. Those are slippers.

2 Q. How much do those weigh?

3 A. Those weigh a few ounces.

4 Q. Okay.

5 A. There is some jars. I'm not quite sure what that is. My
6 sight is not all that great.

7 (Video continues.)

8 A. That's a bucket, which she's putting under, mop.

9 Q. What is that, Dr. Fernandez?

10 A. I haven't -- I cannot figure out what that is.

11 Q. Neither can I.

12 Let's see if she put more than one item into the bag. If
13 so, I would like for you to estimate for me the weight of the
14 bag.

15 (Video continues.)

16 Q. No.

17 Okay, Dr. Fernandez, now she's putting three items, four?

18 A. Four.

19 Q. And so what is the weight of that multiple item bag?

20 A. Less than 10 pounds.

21 Q. How do you know that?

22 A. How do I know that? It seems less than 10 pounds and
23 basically if you look in the --

24 Q. Dr. Fernandez, you said you didn't know what the products
25 were that were being placed in it?

1 **A.** They were small products. Unless they are very heavy or
2 bulky --

3 **Q.** So if it was a large --

4 **MR. WOHL:** Please, please, please. This is, like, the
5 fifth time he's interrupted the witness. This is
6 unprofessional and unfair.

7 Could he please restrain himself and let Dr. Fernandez
8 testify? This is not a brow-beating exercise as much as he
9 would like it to be.

10 **THE COURT:** In between, please tell me what you were
11 trying to say.

12 **THE WITNESS:** Sir, what I was trying to say is if it
13 were less than 10 pounds, if we estimated it less than
14 10 pounds, we didn't try to measure it, what the weight was.

15 If it was more than 10 pounds, we were trying to figure
16 out what it was. And so far I've not seen 10 pounds. I've
17 not.

18 Now I missed this one.

19 **THE COURT:** Those were the rugs.

20 **THE WITNESS:** Those were the rugs.

21 **A.** The milk cans, you know, a gallon of something, of liquid,
22 that would surely be.

23 Now this is more than 10 pounds what she's lifting.

24 **THE COURT:** What is it?

25 **THE WITNESS:** This is soda.

1 A. And for each of those entries, sir, we marked out: It's
2 soda. It's this. It's this. It's this. We've told them what
3 it is. We told whoever wants to see what it is.

4 (Video continues.)

5 A. That is antifreeze, or that's more than a gallon. It's a
6 gallon of some -- of some liquid. And that's going to be,
7 again, more than 10 pounds.

8 (Video continues.)

9 A. Those are multiple items, but those are certainly not
10 10 pounds.

11 Q. Dr. Fernandez, a gallon of antifreeze weighs 9.33 pounds,
12 according to Google?

13 A. According to Google, with the container?

14 Q. Yes, totally.

15 A. I said close to 10 pounds. So if you're using 10 pounds
16 as the exact cut-off, no.

17 I mean, you looked at Dr. Johnson's cut-off as well in my
18 deposition. You asked me, and I said close to nine or
19 ten pounds. I said that in my deposition as well. Different
20 makes are going to have slightly different weights.

21 (Video continues.)

22 THE COURT: What is that?

23 THE WITNESS: I'm not quite sure what that is. That
24 seems like a large rug to me.

25 THE COURT: A what?

1 **THE WITNESS:** A rug. That will be more than
2 10 pounds.

3 (Video continues.)

4 **THE COURT:** All right. I think we've reached the end
5 of the utility of this particular setting.

6 **MR. DOSTART:** All right, your Honor. We're happy to
7 move on.

8 **THE COURT:** When are you going to show your 15-minute
9 segment?

10 **MR. DOSTART:** We're happy to take a break right now,
11 your Honor.

12 **THE COURT:** Let's do it now.

13 **MR. DOSTART:** Okay. We'll do it right now.

14 **THE COURT:** This, for the record, for the reader, I'd
15 ask both sides to pick out a 15-minute segment uninterrupted
16 from all of these videos to help the judge get a feel for what
17 goes on at the cashier's stand and they have the freedom to
18 choose any 15-minute segment they wanted.

19 So I have already seen the Kmart version. What is your
20 version? Identify it for the record.

21 **MR. DOSTART:** Yes, your Honor. This is a clip taken
22 on August 8th -- excuse me. I keep saying that. August 7th,
23 2012, at 12:01 p.m.. And it is video No. 111_02_R.

24 **THE COURT:** Great. All right. So, and I'll say to
25 the witness, if you see something there that is of enormous

1 importance you want to point out, then you just blurt it out.

2 If counsel wants to ask a question, ask the question.

3 Go ahead and do whatever you would like to do on it. And
4 if the cross examining side wants to -- I'm sorry, not the
5 cross examining. The Kmart side wants to come back to it, make
6 a note of what second it is so that you can tee it back up
7 later on when you come back to the lectern.

8 All right. So otherwise the court reporter won't be
9 taking anything down. So roll the tape, please.

10 (Videotape played in open court.)

11 A. She reached out and adjusted the touch screen. She's
12 reached out and touched the credit card machine.

13 BY MR. DOSTART:

14 Q. Dr. Fernandez, how much does that bag weigh?

15 A. Less than 10 pounds.

16 Q. How do you know that?

17 A. There's some clothes items in it. Clothing items in it.

18 Q. So if it -- if it's clothing items, it weighs less than
19 10 pounds?

20 A. I did not say that, sir. I said in this particular case
21 it's clothing items, a few clothing items. If there were a
22 number of clothing items and they were heavy, I would have told
23 you. And there were larger pieces in there. Might be larger
24 pieces here.

25 Q. How much does a pair of jeans weigh?

1 **A.** I don't know the exact -- if you like, I can find out what
2 it weighs, but in my report it would say that in that -- in
3 the --

4 **Q.** I'm sorry. Your report says how much --

5 **A.** It's what's marked in the -- in the sheets.

6 Extended reaches. She's returning the money and the
7 receipt to the customer.

8 (Video continues.)

9 **A.** She's reaching out to the credit card machine again.

10 **THE COURT:** What is she doing there?

11 **THE WITNESS:** Basically the customer sometimes are
12 requested to perform a survey; sometimes they do, sometimes
13 they don't. So if they don't, she goes ahead and just cancels
14 it. She so reaches out and she cancels it. That's what she
15 does.

16 **THE COURT:** She reaches out and does what?

17 **THE WITNESS:** She cancels out the survey. Says no, I
18 don't --

19 **THE COURT:** Oh, the survey.

20 **THE WITNESS:** The survey, yeah.

21 (Video continues.)

22 **A.** She's explaining to the customer what these items are and
23 the cost. Something of that nature.

24 **THE COURT:** Does the survey on the credit card reader
25 occur before or after the transaction is finalized?

1 **THE WITNESS:** Sometimes, it seems it occurs closer to
2 the end.

3 **THE COURT:** You're guessing now. I don't want you to
4 guess.

5 **THE WITNESS:** No, sir.

6 The top view sometimes gives you, shows you the change in
7 the screen of the survey -- of that credit card machine.

8 **BY MR. DOSTART:**

9 **Q.** In your estimate, Dr. Fernandez, does that bag weigh more
10 or less than 10 pounds?

11 **A.** These are six or seven items. I'm not quite sure how many
12 items there were.

13 **Q.** Do you have an estimate of --

14 **A.** At this point I don't. I don't have my cheat sheet.

15 **Q.** Do you know which items were placed in that bag?

16 **A.** I would have to go back and forth, back and forth to
17 figure it out. That's what they would have to do as well.

18 She's reaching out to both the coupon and the register.

19 (Video continues.)

20 **Q.** What is being placed in that bag, Dr. Fernandez?

21 **A.** One seemed like jeans, one seemed like some sweats, but I
22 can't see it too clearly with one view. Sometimes the top view
23 gives us a better view. Sometimes the side view gives you the
24 better view.

25 **Q.** Can you estimate for us the weight of that bag?

1 A. It's less than 10.

2 (Video continues.)

3 A. While she's doing all of this, she's moving around.

4 (Video continues.)

5 A. She's reaching out again. Back flexion. Reaching out
6 forward. Lateral movements.

7 (Video continues.)

8 A. She's reaching out again and helping the customer with the
9 credit card machine. Steps up, picks up the coupon.

10 (Video continues.)

11 A. Bending down to bag the item. Back twist. She's reaching
12 out and continuing her reach. Twist her neck. Leans forward.

13 (Video continues.)

14 THE COURT: When the cashier is reaching out just like
15 she did a moment ago, what is she reaching for?

16 THE WITNESS: She's reaching out for the touch screen.

17 THE COURT: Right there?

18 THE WITNESS: Yeah, touch screen.

19 THE COURT: What's on the touch screen?

20 THE WITNESS: Instead of the keyboard, she can operate
21 some of the things on the touch screen.

22 THE COURT: Like -- like if it was a grocery store,
23 punch the banana square so bananas would be registered; is that
24 the kind of thing in there?

25 THE WITNESS: I don't think it's that kind of detail.

1 I think most of it is scanning on here.

2 If she was to register, she enters it on the key pad. She
3 doesn't use the touch screen as much though.

4 (Video continues.)

5 **Q.** What does the cashier appear to be doing now, Dr.
6 Fernandez?

7 **A.** Counting the money and putting -- possibly putting away
8 the coupons and a bunch of other things.

9 I don't have a top view that would -- these are the
10 statements, the receipts. She's reconciling some stuff here.
11 She's bending down.

12 You started at 12 -- what sometime did you start? 12:00?

13 **Q.** Slightly after 12:00.

14 **A.** The counter says you have been running for 17 minutes,
15 sir.

16 **MR. DOSTART:** Okay.

17 **THE COURT:** All right. Thank you.

18 **MR. DOSTART:** I have a few more questions, your Honor.
19 Should we take our break now?

20 **THE COURT:** Let's finish. I want to go all the way to
21 at least 9:15.

22 Remember, whatever -- I think we should be bringing this
23 to a close so we'll leave time for closing arguments, but
24 whatever time -- we're going to limit the time for closing if
25 need be.

1 **MR. DOSTART:** Yes, your Honor. Of course, your Honor.

2 **BY MR. DOSTART:**

3 **Q.** Dr. Fernandez, how you would define the word "repetitive"?

4 **A.** Repetitive?

5 **Q.** Yes.

6 **A.** Done on a regular basis, but when you go ahead and use the
7 word repetitive in -- Barbara Silverstein who has done quite a
8 bit of work. I think she has one every two minutes -- one
9 every -- one second.

10 (Brief pause.)

11 **A.** She's the only researcher that has a definition.

12 **Q.** And what is that definition, if you can remember?

13 **A.** Offhand, I don't. Offhand, I don't.

14 **Q.** You said one every two minutes. Is that --

15 **A.** No, no, that's incorrect. No. That -- when I said it, it
16 did not sound right, no. That's not...

17 **Q.** Dr. Fernandez, in your ergonomics practice do you agree
18 that it is important to familiarize yourself with the
19 applicable laws relating to workplace conditions?

20 **A.** Yes.

21 **Q.** In your practice do you advise clients that they should
22 follow the applicable law when they design their employee work
23 stations?

24 **A.** The laws, yes.

25 **Q.** And, Doctor, do you have any evidence at all that Kmart

1 gave consideration to California seating law when it designed
2 its Tulare work stations?

3 **A.** I am not aware of the law. I'm aware of some regulations,
4 statute guidelines. I'm not sure what it is really because I
5 don't know the term and I don't know what Kmart did.

6 **Q.** Doctor, you would agree, though, that Kmart should give
7 consideration to California seating law when designing any work
8 stations to be constructed in the future, correct?

9 **MR. WOHL:** Objection, your Honor. Calls for a legal
10 conclusion. Beyond this witness's expertise.

11 **THE COURT:** Sustained. That does call for a legal
12 conclusion.

13 **MR. DOSTART:** No further questions, your Honor.

14 **THE COURT:** All right. We're going to get started on
15 the redirect and then we'll take our break.

16 **MR. WOHL:** Thank you, your Honor.

17 **REDIRECT EXAMINATION**

18 **BY MR. WOHL:**

19 **Q.** Dr. Fernandez, do you recall in your cross-examination Mr.
20 Dostart questioned you about your testimony about how much of
21 the time the cashier was engaged in transactions at the
22 register versus not being engaged in transactions?

23 **A.** Yes.

24 **Q.** And he read to you from some portion of your deposition
25 transcript?

1 A. Yes.

2 Q. I'd like to show you a portion he didn't have you read, or
3 he didn't read himself --

4 A. Which is later.

5 Q. Which is the deposition taken on Thursday October 4, 2012
6 starting on Page 33, Line 15 and reading through Page 34,
7 Line 5.

8 Would you read that for me, please?

9 A. I'm aware of what is written there.

10 Q. Why don't you read it to the Court so we have that in the
11 record.

12 (Document was tendered to the witness.)

13 A. Line 15. "Were you" --

14 Q. Say "Question" and "Answer."

15 A. (As read)

16 "QUESTION: Were you asked, Doctor, to estimate how
17 much time cashiers at Tulare spent on any of the
18 activities listed in Table 2?

19 "ANSWER: The amount of time spent on transactions
20 that I have. The duration of a transaction" --

21 Q. I'm sorry. Go a little bit slower so the reporter can
22 take down and the judge can hear you well.

23 "ANSWER: If you're asking me the duration of each of
24 the items, then the answer is no.

25 "QUESTION: When you say the amount of time spent on

1 the transaction, what amount of time do cashiers at
2 the Tulare store spend at the transaction at the
3 front end register?"

4 "Ms. Sommerfeld: Overbroad and, therefore, incomplete
5 hypothetical."

6 **"ANSWER:** According to the random sample we collected
7 for that one week, 35 out of an hour for the
8 registers we looked at."

9 "But Mr. Clapp:

10 **"QUESTION:** So you're saying -- well, let me back up."

11 **Q.** Keep going, if you want to. Actually, Line 5 was fine but
12 if there's anything more relevant to this, by all means,
13 include it. I think that's where it was relevant.

14 So is your deposition testimony you just read consistent
15 with your court testimony about how much time cashiers spend,
16 according to your observations, engaged in transactions at the
17 register per hour?

18 **A.** Yes.

19 **Q.** Mr. Dostart also drew your attention to Table 3 of your
20 report, which is Exhibit 213-14, if you have that in front of
21 you, and drew your attention to the statistic that the number
22 of heavy items present was 3.47 per hour, correct?

23 **A.** Yes.

24 **Q.** And he then had you derive a ratio or percentage of 3.47
25 over 60 minutes, correct?

1 A. Yes.

2 Q. Now, that, however, is not the same as the percentage of
3 transaction time in which a heavy was present, isn't that
4 correct?

5 A. This is per hour. The transaction time is going to be --
6 per transaction is going to be different, yes.

7 Q. So Mr. Dostart had you do the ratio of 3.47 over 60
8 minutes, is that correct?

9 A. That's right.

10 Q. If we were looking at how many heavy items per transaction
11 time, what should be in the denominator of that fraction
12 instead of 60 minutes?

13 A. Thirty-five.

14 Q. And if you use 35 rather than 60, what would your
15 resulting percentage be?

16 A. I need a calculator again.

17 Q. All right.

18 MR. WOHL: Do we have a calculator we can provide him
19 with?

20 THE COURT: 3.47 by 35 is going to be 1 every 10
21 minutes.

22 THE WITNESS: One every ten minutes, yes. About
23 one --

24 THE COURT: Is that correct?

25 THE WITNESS: Yeah, 10 percent.

1 **THE COURT:** No. Because -- it's not 10 percent.
2 Think about it --

3 **THE WITNESS:** One over --

4 **THE COURT:** The 35 is what? Is that minutes?

5 **MR. WOHL:** Yes, your Honor. That's what the witness
6 testified to be the amount of transaction time behind the
7 register.

8 **THE COURT:** So you can't -- if you've got time in the
9 denominator, you can only use a percentage of time as in the
10 numerator. But you don't have time in the numerator, do you,
11 or do you?

12 **THE WITNESS:** No. I don't have time in the numerator.

13 **THE COURT:** All right. So then it would be every 10
14 minutes you would have a transaction involving 10 pounds or
15 more, is the way I see your logic.

16 **THE WITNESS:** Yes.

17 **THE COURT:** All right. But it's not -- that's not the
18 same as 10 percent.

19 **THE WITNESS:** That's not the same as 10 percent, yeah.

20 **MR. WOHL:** Thank you.

21 **BY MR. WOHL:**

22 **Q.** And it's not the same as once every 17 minute figure Mr.
23 Dostart had you calculate, is that correct?

24 **A.** One over 17 is per hour and one over 10 is per
25 transaction.

1 Q. Per the transaction time you mean?

2 A. Per the transaction time.

3 Q. All right, thank you.

4 Mr. Dostart played for you 15 minutes of a video and you
5 observed it. During that video, did you see any steps or
6 movements by the cashier?

7 A. I didn't.

8 Q. Did you see any twists?

9 A. Yes.

10 Q. Did you see any bends?

11 A. Bends, yes.

12 Q. Did you see any extended reaches?

13 A. Yes.

14 Q. Did you see any lifting over the head?

15 A. Reaching over the head?

16 Q. Not reaching over the head. Raising over, say, the
17 shoulder or raising the arms up?

18 A. She did that.

19 Q. In particular, did you see what types of transactions did
20 she raise her arms up?

21 A. Transactions basically when she was reaching out to the --
22 to the coupon and the -- the coupon printer and the cash
23 register -- the receipt printer. And I did not -- could not
24 pay much -- did not pay much attention when she was putting the
25 clothes together. I'm not sure she lifted it above her

1 shoulder. I'm not quite sure.

2 Q. Would you like to see that snip of the video again when
3 she was handling a lot of clothing to see to what extent she
4 was raising her arms? Would that be helpful? It would be a
5 short segment, two or three minutes.

6 A. I wouldn't mind, sir.

7 THE COURT: If that's what you want to do, go ahead.
8 Show the segment again. I don't want to see all 15 minutes
9 again.

10 MR. WOHL: I don't want to belabor it if the point is
11 clear to your Honor.

12 THE COURT: I do remember scenes where the cashier was
13 shaking out clothing items, if that's what you have in mind.

14 BY MR. WOHL:

15 Q. Do you have that in mind?

16 A. She was doing this (indicating), but I wasn't quite sure
17 if it's above shoulder height. That's all I'm saying.

18 Q. I understand and it's probably my fault for using the
19 phrase "above shoulder."

20 My point, though, is: Were there instances where she was
21 raising her arms?

22 A. Yes.

23 Q. In connection with the folding of clothing?

24 A. Yes, she was.

25 Q. How often did you see that happen in the 15-minute

1 segment?

2 **A.** It happened more than once, but I'm not quite sure.

3 **Q.** Were any of those movements that you observed on the video
4 in your view movements that ergonomically could be
5 appropriately done in a seated position as opposed to a
6 standing position?

7 **A.** In the seated position, it would increase the risk. It
8 would increase the risk.

9 The folding of the clothes is going to be very difficult
10 doing in a seated position. One would have to get off the
11 stool, the seat or whatever, and do some of it because you need
12 the space.

13 **THE COURT:** People -- wait a minute. People fold
14 clothes all the time while they are seated. This is a
15 household thing.

16 I don't understand your point that it's somehow dangerous
17 to take a seat and fold clothes.

18 **THE WITNESS:** I didn't say it was dangerous. What I
19 meant was some of the clothing, when you're putting it in a
20 bag, you're stepping out. You're trying to open the bag out.
21 And if you don't open the bag, you end up on the counter. You
22 end up doing this (indicating). If you pull it, come back, you
23 could put the clothes at the lower level. That's what I mean.
24 That's what --

25 **THE COURT:** You're talking about the step of putting

1 the clothes into a bag?

2 **THE WITNESS:** Bag, yes.

3 **THE COURT:** All right.

4 **THE WITNESS:** And occasionally when you -- so, like, a
5 dress. And I didn't see that, of course, in this 15, but
6 that's another situation.

7 **THE COURT:** Go ahead.

8 **BY MR. WOHL:**

9 **Q.** In terms of the NIOSH guidelines, what your understanding
10 as to what their applicability is?

11 **A.** NIOSH guidelines are used by OSHA where it comes to
12 lifting. We're talking about the lifting guidelines. It's
13 used by OSHA and OSHA uses it for citation purposes using the
14 general duty clause, which is the 5-A.

15 **Q.** Are the guidelines specific to any particular job
16 function?

17 **A.** No. It's in general.

18 **Q.** Would an ergonomist automatically apply the NIOSH
19 guidelines to any particular job without consideration for what
20 the job was about?

21 **A.** Yes.

22 **Q.** Would the ergonomist -- what other factors would the
23 ergonomist need to know to decide whether a function could be
24 performed in a seated or standing position?

25 **A.** That -- the lifting guidelines have nothing to do

1 withstanding or seated.

2 Q. Okay.

3 A. The lifting guidelines is specifically for lifting
4 purposes.

5 Q. Okay. Understood.

6 You were asked about the difference between -- or at least
7 you were asked about the maximum reach and then you mentioned
8 the normal reach.

9 Can you just explain again for the Court what the
10 difference is between maximum reach and normal reach?

11 A. Maximum reach is if you draw an arch, this is your maximum
12 reach (indicating). I'm going ahead and going ahead at the
13 shoulder height and doing -- and drawing an arch around. This
14 is my maximum reach (indicating).

15 My normal working area or -- or primary is basically if I
16 drop my arms down and I draw an arch now. Draw an arch with my
17 arms spread (indicating). This is the primary or normal.

18 You do most of your work -- and that is what is
19 recommended. You do most of your work in that primary area.
20 That's what I have in my book as well and that's what all
21 ergonomists, even in Dr. Konz's book, where Dr. Johnson is the
22 co-author, he also promotes the same thing.

23 Q. So ergonomically do you want to design a work station that
24 promotes usual use of a normal reach space or a maximum reach
25 space?

1 A. Normal. You try to get -- get as much as possible in the
2 normal, the primary task. But there are -- there's always a
3 shortage of real estate space on the counter, space on the work
4 station. And so you've got to make a decision based on
5 priority what's used most often and that goes in the primary
6 area.

7 Q. Mr. Dostart referenced the Lehman study. Can you explain
8 to the Court what the Lehman study was?

9 A. Lehman basically looked at seated cashiers and standing
10 cashiers and basically -- looked at different variables. She
11 looked at -- she did subjective responses. She did -- and she
12 did physiological, some physiological measurements as well.
13 The weight she lifted, though, doing in that particular grocery
14 store weighed from a few grams to you, I think, six kilograms
15 and then she had two or three other higher weights.

16 Q. Where was the study conducted?

17 A. In Scandinavia somewhere.

18 Q. And what type of business were the cashiers working at?

19 A. It was a grocery store.

20 Q. And in connection with the study, did the cashiers sit or
21 stand in terms of normal business activity before the study?
22 That is just how they would operate the job normal?

23 A. Is it -- what my understanding is they were sitting.

24 Q. And how many subjects does she study?

25 A. Ten.

1 Q. And did she express any -- did she report that by and
2 large the cashiers expressed a preference for sitting versus
3 standing?

4 A. Yes.

5 Q. And did she express any opinion about why they expressed
6 that preference?

7 A. She felt that basically they were not aware of the risk
8 and if they were aware of the risk, they might not have done
9 that.

10 Q. And in connection with the various other articles that Mr.
11 Dostart brought to your attention and asked whether you had
12 considered them or not, to the extent you told him you didn't
13 consider those articles, can you explain to the Court why you
14 didn't consider those articles in forming your conclusions in
15 this case?

16 A. Some of them were in an area that -- where the task is so
17 different that it is very difficult to apply. I use articles
18 that were generic, when you're talking about sitting, standing
19 and so on.

20 Q. That's fine, your Honor. Thank you -- fine, Dr.
21 Fernandez. Thank you.

22 With regard to the tape analysis, just so we're clear, can
23 you take Judge Alsup through what actual methodology and your
24 team used to analyze 30 hours of videotape that you have
25 reported on?

1 **A.** Basically the videos were, the 30 hours -- first of all,
2 all the data were provided in DAV format. DAV format is the
3 format that the DVR player procedures. We converted that using
4 the metadata that's putting a time stamp on it and converted it
5 to AIV, and the DVD player allows us to do that.

6 From there we then use a player called Kinovea. Kinovea
7 basically what it does is -- K-i-n-o-v-e-a, I think. It's in
8 my report. It allows you to put both the screens together. It
9 gives you an opportunity to run one or both controls. So you
10 can run the controls together, so both -- the times are the
11 same, so it moves at the same time. So if you want to stop,
12 you want it to slow motion, you just have to hit one key and it
13 controls both the screens.

14 So my associates, two of them plus two others, worked on
15 these -- these analyses and what they did was evaluate in slow
16 motion. Every time they found something, they went and
17 documented it and then went ahead and had to do research to
18 figure out what it was.

19 **Q.** And how much time, if you know, on average did they spend
20 per hour of videotape, say, before they reached their
21 conclusions as to what it showed?

22 **A.** Basically for a one-hour tape, it takes between four to
23 six hours.

24 **Q.** And then let me take you back -- I'm sorry. I should have
25 asked you this before.

1 If you go to Table 3 of your report again, Exhibit 213-14.

2 A. Yes, sir.

3 Q. And I previously had you do the calculation for the number
4 of heavy items present. That was the 3.47 over what you
5 testified was 35 minutes average transaction time.

6 (Calculator was given to the witness.)

7 Q. Could you now do the calculation for the number of
8 instances in which heavy items were lifted, which you report in
9 the table as being 6.07. So 6.07 divided by 35 minutes.

10 A. Every nine-point -- for some reason I have a problem.

11 (Discussion held off the record amongst
12 defense counsel.)

13 A. Every 5.8 minutes? Is that about correct?

14 Q. Is that your math?

15 A. That's 60 divided by --

16 Q. 6.07 divided by 35?

17 A. Yes.

18 Q. Okay. No other questions, Dr. Fernandez. I appreciate
19 your time yesterday and today.

20 MR. DOSTART: Extremely briefly. We will be done,
21 hopefully, before 9:15.

22 THE COURT: All right.

23 RECROSS EXAMINATION

24 BY MR. DOSTART:

25 Q. Dr. Fernandez, Mr. Wohl addressed this 35-minute issue,

1 and I want to come back to it very briefly.

2 Isn't it true that the 35 minutes only included the time
3 from when a cashier initiates a limb movement to start a
4 transaction activity or transitions to the next activity until
5 the cashier completes the limb movement to end the transaction
6 activity?

7 **A.** Yes, sir.

8 **Q.** Well, Dr. Fernandez, isn't it true that there is some time
9 in between those limb movements where the cashier would be at
10 the cash register station?

11 **A.** Between the transactions?

12 **Q.** Well, I want to be very clear, sir. The answer to your
13 question is, yes, between the transactions. Not just between
14 the transactions, but between the limb movements from where you
15 began counting time and you finished counting time.

16 And when I say time, I mean the time period that
17 encompasses that 35-minute interval.

18 **MR. WOHL:** I'm sorry, your Honor. I'm going to
19 object. I don't understand the question. I'm not trying to be
20 hard here. I just don't understand what the actual question to
21 Dr. Fernandez is.

22 **THE COURT:** All right. Start again, please, and try
23 the question again.

24 **BY MR. DOSTART:**

25 **Q.** Dr. Fernandez, I'm going to talk to you about the

1 35-minute interval that is reflected on Table 3 that Mr. Wohl
2 has talked to you about and that I have talked to you about.

3 Do you understand the time period I'm discussing?

4 **A.** Yes, I do.

5 **Q.** Is it true that when calculating the time that would
6 result to be that 35-minute interval, you began counting the
7 time for an individual transaction at the moment the cashier
8 initiates a limb movement to start the transaction activity or
9 transitions to the next activity; is that true?

10 **A.** Yes.

11 **Q.** Is it true that from that start point you would end the
12 time period for an individual transaction when the cashier
13 completes the limb movement to end the transaction activity?

14 **A.** Right. But if a transaction occurred
15 back-to-back-to-back, it would have been from the first limb
16 movement to that last limb movement. If there were, like, five
17 transactions, it would have encompassed all that time. If
18 that's your question, sir.

19 **Q.** Well, my question is this, Dr. Fernandez: Is it true that
20 there is some time in between customers that is not included
21 within the 35-minute interval?

22 **A.** When you say -- again, this is the clarification I need,
23 sir.

24 If there were customers back-to-back-to-back --

25 **Q.** That's not my question, Dr. Fernandez.

1 **A.** If there were not, then -- that's the confusion I'm
2 having, sir. I'm not trying to be difficult.

3 **MR. WOHL:** Your Honor, I think the confusion is
4 counsel is referring to the 35-minute interval, which suggests
5 a continuous 35 minutes. I don't think that's the witness's
6 testimony.

7 **MR. DOSTART:** I'm going to go ahead and read from the
8 deposition.

9 **MR. WOHL:** I think that's the confusion.

10 **THE COURT:** Go ahead and read from the deposition.

11 **MR. DOSTART:** Thank you.

12 **MR. WOHL:** Sorry, where is it.

13 **MR. DOSTART:** I apologize. This is from the Thursday,
14 October 4, 2012 deposition of Jeffrey Fernandez on Page 35,
15 Lines 6 through 9.

16 **MR. WOHL:** Thank you.

17 **BY MR. DOSTART:**

18 **Q.** "Question" --

19 **MR. DOSTART:** You know what? I'm going to go back
20 because I want to make sure the record is clear.

21 **MR. WOHL:** Okay.

22 **MR. DOSTART:** So it's going to be Page 34, Line 25 to
23 Page 35, Line 9.

24 **BY MR. DOSTART:**

25 **Q.** (As read)

1 **"QUESTION:** And where on Table 3 do you derive your
2 estimate that cashiers spend 35 minutes out of every
3 hour on that activity?

4 **"ANSWER:** It says 'Duration of Transactions, 35
5 point.' It's the third row. Duration of
6 transactions in minutes.

7 **"QUESTION:** Does the 'Duration of Transactions' number
8 include the time that cashiers spend waiting for
9 customers while they are at the front end check
10 stand?

11 **"ANSWER:** No."

12 Do you stand by that statement, Dr. Fernandez?

13 **A.** I stand by that statement. And then I went ahead and I
14 said when there were no -- at that time I did not have that
15 calculation.

16 And then I went ahead and calculated it and I said, it was
17 from zero to 50 seconds and the average was 15 seconds. That's
18 what I said. I said yesterday.

19 **Q.** Okay. I would like to read from Page 35, Line 17 to
20 Page 36, Line 4.

21 **"QUESTION:** Well, isn't there some amount of time
22 between customers that's not captured within the
23 'Duration of Transaction' number?"

24 "Objection. Vague and ambiguous. Overbroad."

25 **"ANSWER:** If you're asking me for the few seconds or a

1 minute, possibly a minute, that they are standing
2 there before they go out, it's possible. But I have
3 the duration of a transaction. That's what I
4 measured.

5 "You're asking me a slightly different question, which
6 is fine. Like you said before, this is your
7 deposition. You ask the questions. So, yes, but I
8 measured something different."

9 So, Dr. Fernandez, do you stand by that statement?

10 **A.** I stand by that statement and, again, I want to say that
11 at that time I did not have the time and I went ahead and
12 calculated it and that was between zero and 50 seconds and the
13 average was 15 seconds, and that was not -- that was if a
14 customer came back-to-back-to-back, it was all included in that
15 one chunk.

16 If now there was a break, that break is between zero and
17 50 seconds. Before they leave the work station, they go out
18 and get customers or they go ahead and do something else.
19 That's what I'm trying to say, sir.

20 **Q.** Dr. Fernandez, is it true that you have absolutely no
21 estimate for the amount of time cashiers at the Tulare Kmart
22 spend at the cash register versus other places in the store?

23 **A.** They spend 35 minute at the cash register per day for --
24 during the time that I looked at those 30 hours of video.

25 **Q.** I'm going to read from the deposition transcript Page 36,

1 Lines 6 through Lines 13.

2 **"QUESTION:** Can you estimate for me, Doctor, based on
3 your work in this case what percentage of time the
4 CSAs spend working at the front end check stand as
5 opposed to other places in the Tulare store?

6 **"ANSWER:** I can."

7 "Objection. Over broad. Asked and answered."

8 **"ANSWER:** I cannot estimate that, sir."

9 **MR. DOSTART:** No further questions.

10 **MR. WOHL:** Very briefly, your Honor.

11 **FURTHER REDIRECT EXAMINATION**

12 **BY MR. WOHL:**

13 **Q.** Again, Mr. Dostart, for a reason, doesn't have you read
14 other portions of the depo that seem to be directly relevant to
15 this.

16 Let me have you read, please, from Page 34, same
17 deposition, starting at Line 7 and continuing to Line 23.

18 (Document was tendered to the witness.)

19 **A.** Line 7?

20 **Q.** Yes.

21 **A.** (As read)

22 **"QUESTION:** So your saying -- well, let me back up.

23 What does that 35 minutes out of the hour represent
24 in terms of activities the cashiers were doing? What
25 were they doing during that 35 minutes?"

1 "Ms. Sommerfeld: Broad. Overbroad."

2 **"ANSWER:** Over the -- during the 35 minutes, they were
3 interacting with the client, with the customer,
4 either scanning or it would be the transaction would
5 start when they reach out.

6 "I brought the definition of the transactions on
7 Page 7 on that same table -- same page of Table 2.
8 The start point of a transaction is when a CSA
9 initiates a limb movement to start the transaction
10 activity or transitions to the next activity.

11 "Then the end point of the transaction was when the
12 CSA completes the limb movement to end the
13 transaction activity."

14 "By Mr. Clapp:

15 **"QUESTION:** And where on Table 3 did you derive your
16 estimates that CSAs spend 35 minutes out of the hour
17 on that activity?

18 **"ANSWER:** It says during -- duration of transaction,
19 35 minutes. It's the third row, duration of the
20 transactions in minutes."

21 **MR. WOHL:** Thank you. And just for clarity 35 minutes
22 per hour, were you finding that was a continuous 35 minutes or
23 just a combination of separate measured transactions which
24 totaled up to be 35 minutes?

25 **A.** A --

1 **MR. DOSTART:** Objection. Vague.

2 **THE COURT:** Overruled.

3 **A.** Combination.

4 **BY MR. WOHL:**

5 **Q.** So there could be breaks in between?

6 **A.** Yes.

7 **Q.** And to the extent that the cashier either was standing at
8 the register not engaged in a transaction or away from the
9 register doing something else, would that time have been
10 captured in the 25 minutes?

11 **A.** You would have to repeat that one.

12 **Q.** Yes.

13 So you explained in your deposition how you -- and your
14 testimony how you measured the start and end of a transaction?

15 **A.** Yes.

16 **Q.** So if they did not go back-to-back with transactions, if
17 they finished one and then they had some gap in time before
18 they started the next transaction, are you with me?

19 **A.** Yes.

20 **Q.** And that gap in time was spent either standing at the
21 register, doing something else, not doing anything, or away
22 from the register, is that time captured in the 25 minutes?

23 **A.** It is captured in the 25 minutes and that's -- that's what
24 you asked me to clarify yesterday. And that's what I -- I did
25 not have an estimate of how long were they at the register or

1 not doing transactions. And that's what I've come up with.

2 It's between zero and 50 seconds.

3 **Q.** Not how much time at the register, but that time is
4 encompassed in the 25 minutes?

5 **A.** It's encompassed in the 25 minutes, but they were not
6 involved in the transaction.

7 **Q.** I understand. That's it. Thank you very much.

8 **THE COURT:** All right. Mr. Dostart, let's bring it to
9 an end. Do you have to ask something?

10 **MR. DOSTART:** I do not, your Honor.

11 **THE COURT:** Thank you.

12 (Videotape played in open court.)

13 **THE COURT:** All right. Does the defendant have any
14 more witnesses?

15 **MR. WOHL:** No, your Honor.

16 **THE COURT:** Does the defendant rest?

17 **MR. WOHL:** Yes, we do, your Honor.

18 **THE COURT:** Is there a rebuttal case?

19 **MR. DOSTART:** No, your Honor.

20 **THE COURT:** The evidence is now closed.

21 Now before I make absolutely sure, each side may have an
22 opportunity to make -- to tell me if there is some exhibit you
23 failed to bring in or whatever. This is the time to bring it
24 to my attention. I'm not saying I will allow it in at this
25 late hour, but I'll at least consider it.

1 **MR. WOHL:** I appreciate that, your Honor. Very good
2 of you to make sure we have everything in. We'll check.

3 **THE COURT:** I'll tell you what. We're going to take a
4 15-minute break at this time and then you let me know when we
5 come back.

6 Then we're going to go to the closing statements. Each
7 side has 45 minutes. The plaintiff can reserve some time for
8 rebuttal out of the 45. So you decide how much you want to --
9 whatever you don't use, you can save for rebuttal. All right?

10 **MR. DOSTART:** Thank you, your Honor.

11 **MR. WOHL:** Thank you, your Honor.

12 (Recess taken from 9:29 to 9:51 a.m.)

13 **THE COURT:** Be seated, please.

14 All right. For the record, are there any -- anything to
15 say about the stipulations, evidence, whatever?

16 **MR. MCINERNEY:** One thing, briefly, your Honor.

17 This morning we marked a stipulation as 389. That should
18 have been marked, your Honor, as 390.

19 **THE COURT:** 399?

20 **MR. MCINERNEY:** No, three-nine-zero.

21 **THE COURT:** Agreed?

22 **MR. WOHL:** Sure, your Honor.

23 **THE COURT:** 389, marked earlier, will now be
24 redesignated as 390, the stipulation.

25 All right. What else?

1 **MR. ADKINS:** Other than that, your Honor, the exhibits
2 are complete.

3 **THE COURT:** All right. Now, is that correct?

4 **MR. MCINERNEY:** I believe so, your Honor.

5 **THE COURT:** All right. So I want to be clear on some
6 things, then, before -- have a seat, please.

7 These expert reports are not in evidence. You should not
8 be referring to them unless it's a part of it that is in
9 evidence. What was in a deposition does not count unless it
10 was read into the record.

11 So, we have a trial record, and items were received in
12 evidence. Some stipulations, I guess. There were things that
13 were referred to vaguely. There were some articles that were
14 referred to vaguely, just titles. But they did not get into
15 evidence.

16 It is important to me to decide this case fair and square
17 on the actual record. I'm not going to like it if you start
18 referring to things that are outside the record.

19 Now, this being argument, I guess it's okay. You can
20 refer to the Magna Carta, if you want. You can refer to the
21 Bible. You can refer to whatever. Mark Twain. This is
22 closing argument. That's okay.

23 But when it comes time to do your findings and conclusions
24 of law, you must not veer outside the record. You must stick
25 with what's in the record. All right.

1 So, there we go.

2 Now, Mr. McInerney, are you going to give the closing
3 argument?

4 **MR. MCINERNEY:** I am, sir.

5 **THE COURT:** On behalf of Ms. Garvey, you may now make
6 the closing argument. And if you have any time left over at
7 the end, we'll reserve that for rebuttal.

8 **MR. MCINERNEY:** Thank you.

9 **THE COURT:** Please, go ahead.

10 **CLOSING ARGUMENT**

11 **MR. MCINERNEY:** I have never had occasion to say this
12 before in my career, but I believe I'm appearing here as a
13 private attorney general. And if I wasn't quite sure who my
14 clients were, as -- as a private attorney general, quite
15 ironically, our very case number would remind me.

16 When we filed this case, we received the case number 2575.
17 And under PAGA, that's how any award is divided. Twenty-five
18 percent goes to the aggrieved employees. Seventy-five percent
19 goes to the California Labor Workforce Development Agency for
20 enforcement and for education.

21 They're different clients, but with respect to penalties,
22 they perhaps have similar goals. Neither sets of clients want
23 to see a penalty that would put Kmart under. You heard from
24 several of the cashiers, they work there. This is a bad
25 economy, we need jobs.

1 Similarly, the California Labor Workforce Development
2 Agency, which encompasses many labor-related agencies,
3 including the DLSE, one of their goals is to promote the
4 creation and maintenance of employment in the state of
5 California.

6 However, in this case, a penalty, a penalty is sought.
7 And the reason a penalty is important, your Honor, is that the
8 purpose of a civil penalty is largely deterrence. And without
9 a penalty, without a penalty, Kmart would be free to continue
10 to ignore the wage order, and other employers would be free to
11 continue to ignore the wage order.

12 Now, up until 2004, when PAGA was created the only way the
13 California labor commissioner could do anything was to go in
14 and persuade a district attorney or a city attorney to issue a
15 misdemeanor criminal charge.

16 But everything changed in 2004, when PAGA was created,
17 because it created this system of civil penalties, recognizing
18 that the labor commissioner never had an adequate budget to
19 enforce all the wage orders, and couldn't enforce all the wage
20 orders.

21 Other cases, your Honor, have been referred to in this
22 case and the pleadings leading up to it. But I just -- in
23 order to try to answer the five questions that you've put into
24 your letter to the DLSE, I want to explain that there was a
25 case called *Hilton, Hilton Hotels*. And in that case, the job

1 description probably indicated this should have been a 14(B),
2 should have been a 14(B) charge.

3 The difference, of course, between 14(A) and 14(B) is when
4 you're actively engaged in your work but the nature of the work
5 would allow a seated posture, seats have to be provided.

6 14(B) is a different scenario. That's a scenario where
7 the nature of the work involves standing.

8 And I would throw out the example of a salesman in a
9 department store, where you're moving around the department to
10 wait on customers, assist customers. That, I would submit, is
11 a standing job.

12 But 14(B) provides the situation where there's a lull in
13 the activities. You're still on duty. You're still on the
14 floor. This is not a rest break. That's something else again.
15 But there's a lull in your activities. And 14(B) says that
16 near your work area the employer has to provide a seat so you
17 can sit down during the lull.

18 *Hilton* probably should have been a 14(B), but, in any
19 case, it went off on -- on an interpretation of the whole wage
20 order, and used a section, Section 20 of the wage order, where
21 there's a penalty for underpayment of wages, and said, well,
22 since there's a penalty, there can't be a penalty under PAGA.

23 We took up two cases all the way through the second DCA,
24 both of them, and to the steps of the California Supreme Court.
25 Both of those cases, *99 Cents* and *Home Depot*, the Courts of

1 Appeal said when you have a wage order -- and it was 14(A) of
2 course -- when you have a wage order and there's plain
3 language, you apply the plain meaning.

4 The other important thing those cases said was, these are
5 remedial acts, the wage orders, and so they have to be given a
6 liberal construction.

7 And if there's any doubt about the liberal construction
8 that wage orders should be given, you don't have to look way
9 back in the history of the California Supreme Court. You look
10 back about five or six months, and you see *Brinker Restaurant*,
11 and there's pages in *Brinker Restaurant* that talks about the
12 complete deference that California courts, California courts,
13 have historically afforded Section 14(A) and other provisions.

14 Could I see -- put up number 1.

15 So, as I recall, the first question you posed, generally,
16 was, does "seat" include different items of furniture?

17 And I would suggest, your Honor, that seat is plain
18 language in our society, and that seat is used in 14(A). And I
19 would suggest that it includes benches in parks where people
20 sit, it includes seats on a bus, and it even includes plain,
21 wooden stools.

22 And the reason I say that is, you remember in Ms. Grabau's
23 deposition she was asked about an instance where she was in the
24 Santa Rosa store, and they -- the manager there was confronted
25 by a request by a cashier for a stool. And Ms. Grabau said,

1 you know, yeah, you got to give 'em a stool if they ask for it.

2 So, certainly, Kmart understood that stool to be in
3 compliance with 14(A).

4 You know, and what's reasonable and things like that,
5 well, you know, you come into this courthouse every day and
6 there's two entrances. And it may vary between the two
7 entrances. You know, if you come in through Golden Gate,
8 they're a lot busier than on Turk Street.

9 Now, they both have to be vigilant, those guards down
10 there. They're there to protect us. But, you know, in --
11 in -- you may have a 14(B) situation on Turk Street, where
12 there's lulls in the work and they may sit on a stool.

13 The question number two is a bit tough. "Repetitive."
14 And I'm not going to be able to answer that. I thought maybe
15 Dr. Fernandez could tell us what repetitive means. But it's
16 one of those circular definitions. You go look up repetitive,
17 and you get repeated. So I sort of have to pass on that.

18 But the -- I think the basic rule here is common sense,
19 and you want the cashiers -- the purpose of sitting is
20 recovery. And it may not be that a clerk could sit for ten
21 consecutive minutes, but if you think about it from a common
22 sense point of view, the more you're on your feet, the more
23 valuable even a short period of sitting becomes.

24 Question number three was, well, suppose the job, you
25 know, does allow a seated posture, but the employer wants them

1 to stand to manifest respect.

2 Well, can we see slide number 2.

3 This, perhaps, could have been an issue that Kmart could
4 have taken to the DLSE and said, look, we want 'em to stand.
5 But the problem with the wage order is that it requires a seat
6 for even, you know, a pretty -- pretty low level.

7 In other words, you remember the progression of steps that
8 we talked about. There's effort, which we're all doing. I
9 mean, I'm exerting effort. Everybody is exerting some effort
10 almost all the time. But then we get to fatigue and then,
11 finally, we get to discomfort.

12 And if you look at Section 17, they talk about the
13 employer having to demonstrate that the comfort or welfare of
14 the employee wouldn't be adversely impacted.

15 So they would have had to have shown under Section 17, to
16 get an exemption, that there's somewhere below that orange that
17 says discomfort.

18 Sometimes in argument from employers, we hear the term
19 "health and safety." Those aren't the right words. Health and
20 safety, you're talking about issues that are in the blue, the
21 red and the black. In other words, when you're talking about
22 health and safety, you're talking about pain, injury, and
23 disability.

24 There you get all kinds of other agencies and other
25 concerns. You get OSHA. You get -- you get the fire

1 department involved.

2 You know, I mean, if stools are dangerous, you'd have an
3 OSHA regulation. But I defy anyone to go check the OSHA
4 regulations and see anything about, you know, stools being
5 dangerous.

6 I don't think that the focus should be on whether these
7 cashiers can necessarily respect the customers.

8 I would say what we're seeing here is an issue of
9 corporate arrogance. This wage order has been around for about
10 a hundred years. And it's been roundly ignored.

11 Letters have been written. The court is going to see
12 letters. It was on people's radar back in the '80s and the
13 '90s. We've already submitted the letters that we could find.

14 But it was on the radar, but it just gets ignored. And
15 that's sort of disturbing because it's basically common sense.
16 The human body wants to come to a seated posture after a while.
17 And if there's no really great reason why, you know, you don't
18 have a seated posture, then you've got 14(A) to be respected.

19 The fourth question had to do with business judgment. And
20 I understand, I think, what a business judgment is like. In
21 other words, Kmart, they have these Big Kmart's like Tulare.
22 Then they have Super Kmart's. And Mr. Gonzalez testified those
23 are different because they have full-line grocery stores in
24 them.

25 And so Kmart decides, they study the situation, they

1 evaluate it, and they put a conveyor belt in their Super Kmart,
2 but they decide not to put a conveyor belt or modify the
3 existing Big Kmart's because they're not a full-line grocery
4 store.

5 Could I see slide number 3.

6 Business judgment was not considered. There was no
7 business judgment. There was no real consideration about 14(A)
8 by Kmart. I mean, I think it wasn't on their radar. I mean,
9 the first instance, the first recorded instance we have is in
10 2010, and Ms. Grabau comes up with this directive.

11 So whether there was even a considered business judgment
12 is -- is a big question. But, certainly, there's no evidence
13 that they really considered the comfort and welfare of their
14 cashiers.

15 What we've got in 14(A) is a regulation, a law. And laws
16 embody public policy. And public policy trumps business
17 judgment. And the only exception to that is where a particular
18 statute allows reference to business judgment. We see it in
19 the ADA, 42 U.S.C. --

20 **THE COURT:** Let me --

21 **MR. MCINERNEY:** Yeah.

22 **THE COURT:** All right. In general, I agree with what
23 you're -- your point you just made. But here the 14(A) refers
24 to "reasonably permits."

25 **MR. MCINERNEY:** Yes.

1 **THE COURT:** All right. So what if an employer in good
2 faith has a policy that in a competitive industry they want
3 their employees to stand, given that the customers are all
4 standing, they want their -- they want their employees to stand
5 and to -- when enacting with customers?

6 Now, is that a reasonable consideration, or do you just
7 say -- in other words, we've got to use the word "reasonably"
8 here. If the employer -- let's say they make this decision in
9 good faith. Let's say it's not some kind of a sham, but in
10 good faith the employer believes that for competitive reasons
11 they want to have the employees, dealing with customers, to
12 stand up in the same way that the customers are standing up.

13 So do we take into account that factor as a consideration
14 that gets factored into what's reasonable or not, or do we just
15 say, no, we disagree with that, that's not a -- that's not a
16 marketing point?

17 **MR. MCINERNEY:** 14(A) is an objective standard, your
18 Honor. You refer to the nature of the work, not the nature of
19 the work as the employer contours it. It's the nature of the
20 work.

21 If somebody had come to this court a year before and had
22 been able to ask the question, what's the nature of the
23 cashier's work, the Court probably could have answered that out
24 of common experience and knowledge. The nature of a cashier's
25 work is the nature of a cashier's work.

1 If you allow every single employer to put in what they
2 want, you no longer have any objective standard in the law.
3 And any time we see business judgment allowed to creep into a
4 statute like the California Corporations Code 309, that has to
5 deal with director's liability or the ADA in section -- Title
6 42, both of those specifically allowed business judgment to be
7 entered.

8 Otherwise, otherwise, no law would be enforceable. It
9 would be in the eyes of the beholder as to what's reasonable.

10 It's the nature of the work.

11 **THE COURT:** All right. We would need to get rid of
12 sham excuses, I agree with that. But what if -- you're not
13 answering my question.

14 What if the nature of the work, as defined by the
15 employer, does reasonably require, for competitive reasons,
16 that the cashier stand because the customers are standing, and
17 there's a long line of people behind them, all standing? And
18 the -- let's say that the business genuinely wants to project
19 an attitude of ready to assist those customers.

20 **MR. MCINERNEY:** I would say --

21 **THE COURT:** Let's say -- bear with me for a moment. I
22 know you disagree and you say that's a sham and they just made
23 that up for purposes of this case. But let's assume that I
24 disagree with you. Let's assume, for the sake of argument,
25 that I agree that that is a legitimate business consideration.

1 Okay.

2 Is it your argument, then, that nature of the work has to
3 ignore that, or can consider that, or is it your argument that
4 you just focus on the physical part of the job?

5 Sounds like you're saying you have to focus only on the
6 physical part of the job. But I want to be clear where you --
7 where you part company with the other side on this.

8 **MR. MCINERNEY:** Well, I do focus on the physical
9 because, otherwise, you're off in a land of uncertainty. And,
10 certainly, if -- if -- if Kmart had wanted to, they could have
11 done a survey, they could have done a survey -- a study,
12 rather, and gone into the DLSE, on a Section 17 Application,
13 and said, look, we have surveyed 3,000, 5,000 of our customers
14 when we installed one seated cashier lane, and those customers
15 just despised it, they just despised it. Then -- then, you
16 know, they could have urged that on the DLSE.

17 They never did that. They never made a business
18 judgment -- I mean, a business judgment fundamentally means
19 that the company sat down and they considered it, and they made
20 a decision.

21 What they did here was what they -- they just said, well,
22 this is the way it's always been done. And this is the way
23 Wal-Mart does it. And if Wal-Mart does it, it has to be right.
24 And this is the way Kresge's did it before it was Kmart. And
25 it's the way, even before Kresge's, Woolworth did it.

1 But what somebody else did a long time ago doesn't render
2 it right.

3 **THE COURT:** But is it possible that there's some
4 marketing wisdom in the practice of the ages that in every
5 single department store, in every single grocery store the
6 cashiers are standing?

7 Is it possible that there's some merit to that from a --
8 that that's motivating this, as well? Or are you just saying
9 that it's crass exploitation of the labor market, the labor
10 force?

11 **MR. MCINERNEY:** I'm not saying it's crass
12 exploitation. I'm just saying that they've ignored, ignored
13 the comfort.

14 And here's a point, Your Honor. It's not even
15 fundamentally sound, because we show respect all the time when
16 we're seated.

17 I mean, a receptionist in a law firm, you walk in and
18 you're some big client, who do you first run into? You don't
19 run into the senior partner who glad hands you. You run into a
20 receptionist who's seated.

21 These cashiers testified that they believe that they could
22 show respect while seated. I mean, factually and legally -- I
23 mean, the law says, the law says seated. And it refers to the
24 nature of the work.

25 If Kmart wants to change the law, they're in the wrong

1 place. The right place is about 90 miles to the east, in
2 Sacramento.

3 **THE COURT:** Well, if -- where has the labor
4 commissioner been for the last hundred years?

5 If it's been so rampant for the last hundred years that
6 Kresge's and everyone else is violating the law, doesn't the
7 labor commissioner ever go to any of these stores?

8 **MR. MCINERNEY:** Sure.

9 **THE COURT:** Why hasn't the labor commissioner ever
10 intervened and said, hey, wait a minute, this is violating the
11 law?

12 **MR. MCINERNEY:** When you read the preamble to PAGA,
13 you see it. They say the labor commissioner has historically
14 been underfunded. And because they've been underfunded, they
15 haven't been able to enforce the Labor Code fully; and,
16 therefore, we're creating PAGA.

17 Before 2004, the only way the labor commissioner could do
18 this is take their case down to a city attorney or a district
19 attorney, convince that D.A. that he should stop doing dime
20 bags of coke and take on a highly-complex case against a major
21 corporation. We know what the odds of that one were.

22 **THE COURT:** Let's change the subject and focus on the
23 physical.

24 I guess you still have some time, but -- but the -- I
25 don't want to intrude on your time, but does the trial

1 record -- I notice that we've had this mockup in the courtroom
2 the entire time, like a stranded whale, and not a single lawyer
3 has referred to it, not a single witness has referred to it.

4 **MR. MCINERNEY:** I was going to, Your Honor.

5 **THE COURT:** I'm going to let you have the chance. But
6 it's not in the record now. It's not part of the trial record.
7 It was here; nonetheless, no one ever used it.

8 Does the trial record of admitted evidence contain a
9 blueprint or a graphic design showing what you propose Kmart
10 could do to provide suitable seating?

11 **MR. MCINERNEY:** Your Honor, it doesn't. And there's a
12 reason for that.

13 What Dr. Johnson -- his role was to talk about whether it
14 could have been done. Not whether it could be done in the
15 future, but whether it could have been done. And he did
16 describe the things as suggestions.

17 Now, if you want, I can step over there and put into very
18 concrete drawing the totality of what he said. And I won't
19 depart from the record.

20 **THE COURT:** No, I'd like you to read to me or
21 summarize for me what he said, so that I can have that in mind.
22 Your drawings now would be illustrative. It would be argument.
23 But my question pertained to the trial evidence.

24 **MR. MCINERNEY:** Okay. Can I use Exhibit 216, then?

25 **THE COURT:** You can. But I -- I want to -- yes, you

1 can use anything that's in evidence or from the court
2 reporters' transcript.

3 But I'm not so certain that you have something in evidence
4 that is a plan A, that would actually be shown to work. So I
5 want to see what you say to that point.

6 **MR. MCINERNEY:** Well, I'm going to try to pull
7 together, your Honor, the basic points that Dr. Johnson made.

8 **THE COURT:** All right. Please do.

9 **MR. MCINERNEY:** Okay. And I just didn't want to mark
10 up 216. That's why I was going to use the white sheet. But
11 let me try to do it.

12 I can stand over here, Mr. Wohl.

13 **MR. WOHL:** Thank you.

14 **MR. MCINERNEY:** I said in my opening -- and it even
15 becomes apparent in the 15-minute clip we played -- that the
16 existing workstation is sort of a train wreck for a standing
17 cashier. And Johnson said that a couple of times. He doesn't
18 use words, you know, like train wreck --

19 **THE COURT:** You're not helping me. You're assailing
20 the -- my question is, what would the modified configuration be
21 for which suitable seating could then be used?

22 **MR. MCINERNEY:** Okay. First of all, the existing
23 workstation is very tight. It's so tight you can't use it with
24 a stool.

25 But, that very tightness with modification becomes great.

1 It could become a U workstation, basically, where everything is
2 within swivel reach. That's the irony of it.

3 Okay. So, first of all, underneath here you've got a low
4 shelf that holds two large plastic bins (indicating). You've
5 got to take that out, either completely or move it back into
6 this further left corner area.

7 **THE COURT:** I'm sorry, you take out which bins, now?
8 Let's be precise. Which --

9 **MR. MCINERNEY:** Well, your Honor --

10 **THE COURT:** Is this you talking, or did the expert say
11 this?

12 **MR. MCINERNEY:** He said it. He talked about the
13 two --

14 **THE COURT:** Show me the bins. I see one under the
15 cash register.

16 **MR. MCINERNEY:** Remember, there's two. One is for
17 trash and one is for return items (indicating).

18 **THE COURT:** Yes. So where would those wind up going?

19 **MR. MCINERNEY:** Where they wind up going, your Honor,
20 is back into here, somewhere in the bagging table, okay
21 (indicating).

22 **THE COURT:** In other words, under the counter of the
23 bagging table?

24 **MR. MCINERNEY:** Yeah, because --

25 **THE COURT:** Is that what he said, or is that you

1 talking?

2 **MR. MCINERNEY:** He said you could modify the size, you
3 could move 'em back into the corner, or you could put them into
4 what's now the bagging table.

5 **THE COURT:** He said that?

6 **MR. MCINERNEY:** He said that.

7 **THE COURT:** All right.

8 **MR. MCINERNEY:** Okay. Now, when we talk about the
9 bagging table, you see in the video, the only time that lady in
10 the clip we played was doing any movement was she had to step
11 over to the bagging table. It makes no sense. And you notice
12 the other time she has to move is these bagging prongs because
13 they're facing the wrong way.

14 The idea here, the idea was, get these prongs out of here,
15 move this bagging table over. And Johnson put in a photo.
16 It's one of the 20 -- 28J, or something. It's in blue. And he
17 moves it over, okay, and then cuts it off because it doesn't
18 have to be this way.

19 **THE COURT:** Cuts off what?

20 **MR. MCINERNEY:** He cuts off the sides of the bagging
21 table like we did in what's marked as 150 over there
22 (indicating).

23 **MR. WOHL:** Your Honor, it's not in evidence. So, I
24 thought the argument is supposed to be about what is in
25 evidence.

1 **THE COURT:** What is 150?

2 **MR. WOHL:** He is referring to this thing of beauty
3 over there (indicating). It's not in evidence.

4 **THE COURT:** It's not in evidence. Please don't refer
5 to it.

6 **MR. MCINERNEY:** Okay. So once you've eliminated some
7 of that lower shelf under here, you can move a stool under and
8 you've created knee room.

9 He said move this coupon printer, which you have to reach
10 up to even in a standing position. I don't know who put it
11 there, but it makes no sense. You know --

12 **THE COURT:** Well, where would it go, under what he
13 testified to?

14 **MR. MCINERNEY:** It could go right here (indicating),
15 but it has to be lower. There's no -- there's no reason why it
16 has to be so high.

17 Same thing -- you know, this credit card reader, you look
18 at the pictures and there's no reason why it has to be so high.

19 He said, you know, put it on a swivel, you know, and so if
20 the clerk does have to, you know, do anything with it the head
21 swivels.

22 This is not rocket science, okay.

23 This corner, which everybody has said you can't reach,
24 okay, this far lower-left corner, you know, could be cut off.

25 You know, the idea is you want the customers to put their

1 stuff. And if you look at the video, okay, you look at the
2 video, they're already placing their stuff so the cashier can
3 reach it. They may put it here, but if you look at the video,
4 they -- they push it toward the cashier.

5 You know, they do use the bagging table. But if you moved
6 it over like Johnson said, okay, what you do is you'd get rid
7 of the -- you'd create more room to put the bags on, because
8 right now there isn't enough room on the demagnetizer. You
9 would be putting them over here, but you wouldn't have that
10 step (Indicating). It's just stupid.

11 And the other thing is, what Dr. Fernandez is worried
12 about is this lifting and raising of stuff in the bags. Well,
13 that's because they've got a bag well that you put the stuff
14 down into, and then you have to lift it up.

15 If you put the bags over here, okay, then you do the --
16 what you want to do. You got the items coming across on the
17 counter, the scanner, and then you grab the bag that's right
18 here, not faced away from you, you slide the bags in and you
19 push it out to the customer.

20 **THE COURT:** Pause on that for a second.

21 **MR. MCINERNEY:** Yeah.

22 **THE COURT:** Because I did watch the videos, and the --
23 some of the time, not all of the time, but some of the time the
24 cashier, in one sweep of the arm, would take the item from the
25 right, slide it across the scanner, slide it across the

1 demagnetizer, and, without stopping, drop it into the bag which
2 was hanging from those prongs at the end. And then it would --
3 the left hand would open the bag, with the right hand push it
4 in. It seemed quite quick, maybe an operation less than one
5 second.

6 So I see some advantage in having the bags located at the
7 end of that counter so that the right-to-left sweep can be
8 terminated by dropping the item into the bag.

9 With what you're proposing, the sweep would be a longer
10 sweep, and have to go around to a different part of the bagging
11 table. So maybe I'm missing something, but I think you're
12 skipping over the advantage of having those bags at the end of
13 the -- right at the end of the first counter.

14 **MR. MCINERNEY:** You could weigh -- the disadvantage of
15 the bagging well where you drop everything in is -- and that's
16 what they do at Aldi, everything just gets dropped, okay -- is
17 that you have to lift it back up.

18 Now, to the extent that's a problem, you may get into a
19 business judgment. But if you had the bags accessible to the
20 cashier so that they could be reached from here, the cashier
21 can be grabbing the bag and sliding the items in.

22 If you can imagine, your Honor, moving this over, okay, so
23 you've got a bigger counter area right in here, okay, then
24 you've got more room to slide things into bags and to leave the
25 bags for the customers to pick up.

1 I'd like to save a little time for rebuttal.

2 **THE COURT:** Well, I have more questions for you. I'll
3 let you save some time, but tell me -- let's assume that the
4 configuration that you just described was in place. What would
5 the seat look like? What would the suitable seating be?

6 **MR. MCINERNEY:** It would be a swivel, adjustable
7 stool.

8 **THE COURT:** Would it have arms?

9 **MR. MCINERNEY:** No.

10 **THE COURT:** Would it have a back?

11 **MR. MCINERNEY:** No.

12 **THE COURT:** Would it have wheels?

13 **MR. MCINERNEY:** No.

14 **THE COURT:** Would it fit under the counter?

15 **MR. MCINERNEY:** Yes.

16 **THE COURT:** And when the cashier had to do something
17 which required standing, which would be from time to time -- I
18 think even you would admit that -- what would be the maneuver
19 that would be made by the cashier, and what would be the
20 maneuver made by the chair?

21 **MR. MCINERNEY:** It would be the same maneuver, your
22 honor, I've employed in decades in getting off a bar stool.
23 You slide off to the side, and you push the stool forward with
24 your leg. It's a linoleum floor. And, you know, you have
25 glides. They slide. It's not a heavy stool.

1 **THE COURT:** All right. So the employee would --
2 first, they would have to push themselves out because their
3 legs would be under the counter, right?

4 **MR. MCINERNEY:** No, your Honor. The legs are under
5 the counter, but you've got clear room to rotate under the
6 counter. You've got clearance. It's a complete swivel.

7 **THE COURT:** All right. So with clearance, then,
8 the -- you're saying the employee would swivel, let's say, to
9 the left?

10 **MR. MCINERNEY:** Yes.

11 **THE COURT:** And then their feet would then stand up,
12 right?

13 **MR. MCINERNEY:** Yes.

14 **THE COURT:** And then they would -- the chair, the
15 stool would be out in the open; it would not be under. You
16 have to push that under; is that it?

17 **MR. MCINERNEY:** It would be halfway out. Because when
18 you use the stool, you know, you want your body fairly close to
19 the counter. So it's -- it's not like the stool is out here
20 (indicating). It's here (indicating).

21 **THE COURT:** All right. But it would be at least
22 partially protruding into the work area?

23 **MR. MCINERNEY:** Yes, right.

24 **THE COURT:** So what would then happen, the employee
25 would then bend over and push it under the counter?

1 **MR. MCINERNEY:** (Counsel gesturing.)

2 **THE COURT:** What does that mean?

3 **MR. MCINERNEY:** That's a knee movement, your Honor.

4 **THE COURT:** So the employee would then use their knee
5 to nudge it underneath the counter?

6 **MR. MCINERNEY:** What did they say? The stool was 28
7 inches high. You can either push it with your hand, push it
8 with your leg. And depending on why you're standing, you may
9 not have to move it at all.

10 **THE COURT:** All right. But when it is pushed under,
11 that's going to require movement, agreed?

12 **MR. MCINERNEY:** Yes.

13 **THE COURT:** All right. So now when the employee comes
14 back to resume his or her seat, they're going to have to lean
15 over and pull it back out?

16 **MR. MCINERNEY:** Right.

17 **THE COURT:** Right?

18 **MR. MCINERNEY:** Yes.

19 **THE COURT:** Okay.

20 **MR. MCINERNEY:** It's sort of like when attorneys have
21 to stand up, you know, from where they're at their tables in
22 the courtroom, or at their office. You do move the chair.

23 **THE COURT:** Now, when the employee is seated on the
24 stool, are their feet on the floor?

25 **MR. MCINERNEY:** Well, the optimum is actually a

1 footrest. And, you know, when we're going through this
2 exercise --

3 **THE COURT:** But if there's no footrest, are their feet
4 on the floor?

5 **MR. MCINERNEY:** They can be. I mean, there's three
6 possibilities.

7 Let me answer it this way. Your feet could be on the
8 floor, but better still, for the rest, stools have a built-in
9 ring. You could rest your feet on there.

10 What Johnson prefers is an actual footrest that's built
11 into the back of the counter. But, you know, let me --

12 **THE COURT:** So here's the thing. If their feet are on
13 the floor, by definition their eye level would be reduced below
14 whatever it would be when they're standing.

15 **MR. MCINERNEY:** Not necessarily, Your Honor.

16 **THE COURT:** No, there's no other way to do it. If
17 your legs are bent, you're not going to be standing as high or
18 up as high as whenever your legs are straight.

19 **MR. MCINERNEY:** Well, that -- okay.

20 **THE COURT:** All right. See the point? So if they
21 are -- if the legs are bent, then their eye level is going to
22 be reduced, right?

23 **MR. MCINERNEY:** Somewhat.

24 **THE COURT:** I have one last question. Does -- does
25 the record show where this mirror would go?

1 **MR. MCINERNEY:** Yeah. What he said was, if you wanted
2 to use mirrors you would put them on the opposing checkout
3 lane.

4 You know, what you don't see very clearly here, but maybe
5 you see in the photo, is this type of a, you know, little
6 barrier. Well, every checkout lane has those. And you could
7 mount the mirrors along that so if you were over here you would
8 be looking at mirrors that were mounted along the next one
9 (indicating).

10 **THE COURT:** What kind of mirror does the record show?
11 Would it be these circular things or a flat mirror? What type
12 of mirror would actually be -- I did hear him say mirrors might
13 work, but I never saw a prototype. I never saw any
14 demonstration that it would work.

15 What does the record show? What's the best the record
16 would show on the mirror situation?

17 **MR. MCINERNEY:** It simply says mirrors. It doesn't
18 say convection, concave, anything.

19 But let me make a point, if I may, your Honor. We're
20 talking about what -- what could be done with the existing --
21 what could have been done with the existing prototype, okay.

22 But if you were going to do this, you know, from the
23 get-go, we have an example that's been around for many years.
24 It's called Europe. And we have the photos of checkout stands
25 there.

1 And, more importantly, more importantly, I think
2 Dr. Johnson testified that although there are seated cashiers
3 in at least three or four different types of stores -- and they
4 do bagging. They do it a little differently. They say to the
5 customer, Would you like your items bagged? Okay. And they do
6 bagging. -- there's no literature that indicates there have
7 been any problems.

8 And he said that you get literature when you encounter
9 problems. In other words, if you -- if something, a technique
10 is being used in the ergonomics field, and it's causing strain,
11 discomfort, who knows, disability, then you get literature.
12 And there's no literature out there that the seated cashiers in
13 Europe have had problems.

14 I'm told I have to stop.

15 **THE COURT:** Is there any literature in our record that
16 shows that any of the cashiers in our case have suffered any
17 harm, permanent harm, as a result of standing?

18 **MR. MCINERNEY:** No. You know, we have the cashiers
19 talking about being tired, their feet hurt. It's tough
20 especially, when you're pregnant. But, no, no disability. And
21 we don't have records of our cashiers being permanently hurt.

22 **THE COURT:** On the pregnant person, I remember the
23 testimony was that if she felt she was unable to do her job she
24 could just go home. But if she was there to work, she was
25 expected to be standing at the cashier stand.

1 So I don't think we ought to be making a company-wide,
2 employee-wide, labor-force-wide rule just to accommodate the
3 occasional person who's pregnant. That's a special case.

4 **MR. MCINERNEY:** Well, respectfully, your Honor, there
5 was not only Ms. Mendiola who was pregnant, but Natasha Wright
6 was, too.

7 **THE COURT:** All right. You have used up more than 45
8 minutes. I'll give you five minutes for rebuttal anyway.

9 So we'll now go to the other side. All right. Please
10 proceed.

11 **CLOSING ARGUMENT**

12 **MR. WOHL:** Thank you very much, Your Honor. Thank you
13 very much for your time in this trial. And we know you've paid
14 close attention to it, and I'll do my best in this closing to
15 summarize what I think are the most important points for
16 consideration.

17 The starting point, of course, is Section 14(A). That is
18 the basis for the lawsuit. 14(A)'s language, as Mr. McInerney
19 said at the outset of the trial, is very simple. Twenty-one
20 words:

21 "All working employees shall be provided with suitable
22 seats when the nature of the work reasonably permits
23 the use of seats."

24 What it doesn't say is, for example, all employees should
25 be provided with seats period. What it doesn't say is, all

1 employees should be provided with seats when the nature of the
2 physical work, or perhaps better put, the physical nature of
3 the work requires seats. It says, when the nature of the work
4 reasonably permits seats.

5 It is their burden of proof, as the plaintiff in this
6 case, to have demonstrated in this trial that the nature of the
7 work of the Tulare Kmart cashiers reasonably permitted the use
8 of seats. And plaintiff fell far short of that burden. And
9 she fell short for three reasons.

10 Number one, as you just heard Mr. McInerney say, the
11 checkstand at Kmart is a very tight checkstand. And there is
12 simply no room for a seat where the cashier is expected to both
13 sit for part of the time and to be up on her feet for part of
14 the time. There's just no room for that.

15 She would have to engage in the type of movements that
16 both Dr. Johnson and Dr. Fernandez called no-value-added time.

17 What you just took Mr. McInerney through, getting off of
18 the seat, pushing it in, going about the next step and then
19 getting back on the seat, moving it back out, getting back on,
20 that's nonproductive time. That's not consistent with the
21 Kmart model of fast, efficient processing of checkouts.

22 Number two, as the evidence showed, I think, as
23 convincingly as could be, the actual physical movements of the
24 cashier to perform that checkout process quickly and
25 efficiently are all inconsistent with sitting. We saw those in

1 the videos.

2 Number three -- and your Honor picked up on this very well
3 in your questioning -- Kmart's business judgment, to which it
4 is entitled to make a business judgment, that cashiers need to
5 provide excellent customer service and project a ready-to-serve
6 image would not be consistent with sitting because it would not
7 project to the customer the empathy that the customer is
8 standing, the cashier is standing, too, or that the cashier is
9 on his or her feet, ready to serve, ready to do whatever is
10 required to complete that transaction.

11 We took a look at the diagram, your Honor, of the
12 checkstand. And what you heard from the testimony is that the
13 box, as Dr. Fernandez described it, which was the space defined
14 by the front edge to the cashier, at least, of the register
15 counter, and then the edge of the sales counter to the cashier,
16 was all of 27 inches by 35 inches. Twenty-seven inches by 35
17 inches, your Honor, that's not even a square yard.

18 And that design, whether Mr. McInerney likes it or not,
19 whether he thinks it's a good idea or a stupid idea, as he
20 said, nevertheless, that's Kmart's design, and it's there on
21 purpose. That's not serendipity.

22 The purpose of the design is to facilitate the flow of
23 customers as quickly as possible and as helpfully as possible.

24 So what does that mean? It means, first off, the
25 footprint is relatively small. Why would the footprint be

1 relatively small? Because they want to provide just enough
2 space to get the transaction processed and done, and not to
3 take over too much space in the store.

4 The testimony was there are seven checkout lines. If you
5 had a larger footprint to accommodate more room, something has
6 to give. You either will have to lose a checkout line because
7 now you need more space, therefore, fewer checkout, lines
8 therefore, slower processing of transactions -- that's
9 Mr. Ebert's testimony -- or you could expand the checkout lines
10 and take away some sales merchandise.

11 Well, for a store, that's not a very smart idea. Now
12 you're selling less merchandise, less revenues, less profits.

13 Or you could hire another employee. So now let's have two
14 employees at each checkstand. You have a cashier who will ring
15 up the sale, and a separate bagger to bag the merchandise.

16 Guess what? Your labor costs have now doubled. That's
17 not a smart way to run your business either.

18 So the Kmart design is standing customers, standing
19 cashiers. The cashiers take care of the entire transaction.
20 Let's move this flow as quickly as possible. Therefore, they
21 have this design (indicating).

22 **THE COURT:** All right. But Mr. McInerney's proposed
23 redo would actually take less of a footprint because he would
24 move the bagging table over so that it would now be flush
25 against the demagnetizer; and, therefore, the employee would be

1 able to reach over there and do just about everything sitting
2 down.

3 Now, admittedly, the bins have got to be moved to make
4 that happen, and some adjustments have to be made in some of
5 those -- some of those features. But that's his -- that's his
6 proposal.

7 MR. WOHL: Yes.

8 THE COURT: So what does the trial record show as to
9 whether or not that would be practical, feasible, so forth?

10 MR. WOHL: Okay. Several consequences of that. If
11 you move the bagging table over, you have now more limited the
12 space that the cashier has to move in this area because now
13 she's got a table that's running right against there.

14 So if you think about it now, the true box, not just sort
15 of the metaphysical box, but the concrete box has now become
16 much smaller than what it would have been that way
17 (indicating).

18 Number two, the video showed you there are instances in
19 which the cashier needs to come around to help the customer.
20 And that could be for a variety of reasons.

21 Now, instead of simply walking through the space between
22 the sales counter and the bagging table, the cashier, after
23 getting off the stool, pushing the stool out of the way,
24 walking around, now has to walk all the way around -- in other
25 words, wouldn't be as far as this, but still around, come back,

1 take care of the customer, walk all the way back again
2 (indicating). Non-value-added time, your Honor. Exactly what
3 Dr. Johnson admitted. That's not a smart design.

4 Number three, you've already commented about the utility
5 of the bags being there, the fact that a lot of merchandise can
6 fall right in.

7 Dr. Johnson, I don't think, was very clear with us as to
8 exactly how the bag setup would be on this. But if you recall
9 the testimony, you have basically regular-sized bags hanging at
10 the end. You have large bags and small bags stored under the
11 bagging counter (indicating).

12 If this now is over here (indicating), and Mr. McInerney
13 is saying put the bends underneath there -- and I'll comment
14 about that for a second -- where are the bags going to go?

15 Are the bags going to be on top? If they're on top, then
16 you have to lift the merchandise with the bags in. It doesn't
17 work in terms of efficiency, your Honor. That's why they don't
18 do it.

19 The bins we saw in the videos are used for two very
20 important reasons: trash and return merchandise or hangers.
21 And they were good-sized bins. You saw that on our last video,
22 your Honor.

23 Where are they going to go, and how are they going to be
24 the same size?

25 **THE COURT:** Well, they would fit, it seemed to me -- I

1 was paying attention to this point. It does seem to me that if
2 the bagging table were moved over, or whether it was moved over
3 or not, the bins could fit under the footprint of the bagging
4 table. But then that would displace whatever is in those
5 bagging tables now.

6 What did the record show was underneath the flat part of
7 the bagging table?

8 **MR. WOHL:** The record shows those were the large bags
9 and small bags. And we saw several instances in which the
10 cashier reached under to pull out a large or small bag.

11 So if that is gone -- that's my point. If those are gone
12 and the bins go there, then where do the bags go?

13 Dr. Johnson could not explain where the bags -- he just
14 said, put them someplace else. Didn't explain where.

15 In addition, Dr. Johnson said, I don't know whether the
16 bags would need to be shrunk. I don't know how often they get
17 filled or empty. He had no meaningful information on that,
18 whatsoever.

19 I think common sense would tell you that the underneath
20 space here and here (indicating), that is under the sales
21 counter and under the cash register counter, is larger space
22 than what would be exposed in this bagging table. So,
23 therefore, something has to give.

24 And if you could come up with smaller bins, and still come
25 up with a solution for the bags, then I suppose you could

1 squeeze them underneath.

2 But then guess what? Smaller bins will fill up more
3 quickly, and the cashier will have to spend more time away from
4 helping customers, to empty those bins to wherever they need to
5 go. That's not a smart design, your Honor.

6 Dr. Johnson came up with all of these modifications
7 (indicating). And even with all those modifications, of he
8 could not say that it would even work in this instance. I
9 asked him.

10 **THE COURT:** Where did this list come from?

11 **MR. WOHL:** From his testimony, your Honor. These are
12 all modifications --

13 **THE COURT:** Read off a few of those so that -- I can
14 barely read it from here.

15 **MR. WOHL:** Yes. Sorry. Cut off --

16 (Reporter interrupts.)

17 **THE COURT:** Slow down.

18 **MR. WOHL:** I'm sorry, yes.

19 "Cut off end of counter where customers place merchandise
20 for purchase cut off counter."

21 **THE COURT:** That doesn't make sense to me. What does
22 that mean?

23 **MR. WOHL:** "Cut off end of counter where customers
24 place merchandise." Stop it there.

25 **THE COURT:** Cutting off the corner.

1 **MR. WOHL:** Right. That's what Mr. McInerney was
2 saying.

3 **THE COURT:** All right. Go ahead.

4 **MR. WOHL:** And one consequence of that, your Honor,
5 is, there's now less space for customers to put merchandise on
6 the counter because now you've cut off part of it. So, now,
7 they have to put more forward, which then can decrease the
8 efficiency of the process.

9 Because, now, one customer is in the process of being
10 checked out, the next customer can start loading up. Now
11 you've lost space, so, guess what, that customer may have to
12 wait until this customer has checked out before they can start
13 loading (indicating).

14 Nothing will frustrate a customer more than having to wait
15 longer than they think they should.

16 "Shorten the counter the cash register sits on." He just
17 wanted to shorten that. I don't know if that has particular
18 significance other than, possibly, where the leg clearance
19 might be.

20 "Move the bagging table closer." We talked about that at
21 length.

22 "Put the bags on the other side of the counter so you can
23 slide things across instead of dropping them down." I don't
24 think he was specific as to where that would be.

25 And then lowering the coupon printer and bringing the

1 coupon printer closer, and so forth.

2 But, your Honor, here is the key point. He admitted that
3 he knows of no retailer in the United States, or anywhere,
4 that's ever used this retrofitted configuration. Because let's
5 appreciate what he's doing. He's not starting from scratch.

6 He's saying, I'll accept the checkstand as currently
7 configured, in terms of standing, because I recognize they have
8 to be able to stand for part of the time. And he contends they
9 can sit for part of the time. So he's tried to come up with a
10 configuration that accommodates both, that would allow the
11 cashier to both sit and stand.

12 So it's retrofitting this existing configuration, to try
13 to make that work. No retailer has ever used that. He cannot
14 say if it would work. And he admitted several times, Your
15 Honor -- I think you heard Mr. McInerney say the same thing --
16 these are all conceptual. You really would just have to try it
17 and possibly revise it as you went along.

18 We heard his testimony in the *Brown vs. Wal-Mart case*,
19 Your Honor. I think this was extremely significant. He
20 consulted with Wal-Mart back in 2006-2007, before these cases
21 were brought, before he was the paid expert for these
22 particular plaintiffs' lawyers, because they are the ones who
23 started these cases and used him in several other cases. And
24 he told us that was the first time he was a litigation
25 consultant.

1 So here he's in his regular practice mode (indicating).
2 Wal-Mart is paying good money for good, honest advice. And
3 they asked him, Can we have a seat for our cashiers? And what
4 does he say? He says, well, you wouldn't want to use a seat
5 when you have a position with a lot of upper motion in the
6 torso.

7 **THE COURT:** What is a lean station?

8 **MR. WOHL:** The lean station, as he explained -- and
9 this is shown -- make sure I have it right there. Next one.
10 That was his hand drawing (indicating).

11 So, as you can see, that's where you're not really sitting
12 on the pan, where your back and waist are perpendicular.
13 You're leaning against a platform that's sort of at an angle,
14 and so it gives you a little bit of relief from standing, but
15 your feet are still on the ground and your back reclined.

16 We asked him, Are you proposing this for Kmart?

17 No.

18 We asked Dr. Fernandez and Dr. Johnson, Would this work
19 for Kmart?

20 No.

21 And why is that?

22 Because, unlike a stool, which you can move out of the
23 way, this has to be bolted to the ground because since you're
24 not sitting on top, if you lean back, it will push out right
25 from under you. So they have to bolt it to the ground. It

1 wouldn't work for Kmart because then it's in the way. Now you
2 can't move it out of the way when you have to stand during the
3 transaction.

4 You asked us, in one of the questions, asked the LWDA and
5 the DLSE, but asked us, is this a seat within the meaning of
6 Section 14?

7 I don't know if I have an answer for you, Your Honor.
8 It's a 21-word reg that just says "a seat." I don't personally
9 consider that a seat because you're not really sitting; you're
10 leaning. But I can't give you a definitive answer on that.
11 Certainly, there has been no retailer that has used this
12 configuration. As you recall Wal-Mart in fact did not use it.
13 Wal-Mart cashiers still stand.

14 This was his statement, ungarnished. Without any
15 anticipation he would some day be an expert witness taking the
16 opposite position, he says:

17 "A seated posture would not receive as positive a
18 response from both management and customers."

19 That's why he was trying to go with the lean station,
20 because it looks more like they were standing.

21 Well, here, you're hearing these plaintiffs' counsel
22 saying, oh, customers don't mind if they sit; that would be
23 just fine.

24 Well, that's not what Dr. Johnson said, and that's not
25 what he learned when he talked to Wal-Mart customers at the

1 time. You heard that in his testimony.

2 And then how about this one, your Honor?

3 "My belief is that most of the people will use the
4 lean stool" -- not the seat, just the lean stool --
5 "20 to 40 percent of the time, particularly between
6 customers."

7 In other words, this is just going to be a resting place
8 when they're not waiting on customers. When they're waiting on
9 customers, they're going to have to be up on it their feet.

10 Very, very significant, your Honor.

11 These are some of the unanswered questions that
12 Dr. Johnson was unable to address (indicating).

13 How would you effectively monitor shrink without the pass
14 through? You asked the right question. What kind of mirror
15 are we talking about? How would that really work?

16 It's their burden of proof, your Honor. It's up to them
17 to show you how this would work. They did not do that.

18 Where would the bags be stored, especially the over-sized
19 and extra bags? Where would you put the trash bins? And so
20 forth.

21 How about this pin pad issue? We saw that in the diagram.
22 You have the credit card reader or pin pad that's up higher, to
23 allow the customer easy use of that pin pad. They want to
24 lower that.

25 Well, that might make it easier for the cashier who is

1 reaching across, but not easier for the customer because now
2 the customer has to look down as opposed to having it at eye
3 level.

4 This is supposed to be about customer service, not cashier
5 service. I think they have the wrong idea what this job is
6 about.

7 **THE COURT:** What about the swivel point?

8 **MR. WOHL:** The swivel point, Dr. Fernandez was very
9 clear, and Dr. Johnson, he admitted this as well, in order to
10 move lateral items in a swivel seat you have to brace yourself
11 because, otherwise, you'll go moving because there's no
12 resistance to keep yourself from moving as you move the lateral
13 merchandise.

14 **THE COURT:** You answered my question, but I was
15 referring to the pin pad.

16 Mr. McInerney just told me a moment ago you could have it
17 swivel around even at the same height, so that the cashier
18 wouldn't have to go out into the aisle to look at it.

19 **MR. WOHL:** And that's true. It could swivel. But
20 look at where it's still located on the counter (indicating).

21 Recall, Dr. Fernandez testified that this counter is
22 only -- is 23 inches deep, but that the normal work range -- I
23 asked him again this morning -- the normal work range is more
24 like 17 inches if you're standing, 15 inches if you're seated.

25 So even with a swivel credit card reader, they would still

1 have to reach, they would still have to extend to do that.

2 You might say, what's the big deal about a reach. We all
3 reach sometimes or the other.

4 But Dr. Fernandez said the issue, in terms of a risk of
5 MSD -- musculoskeletal disorders -- is repetitive reach. If
6 you keep doing it beyond the normal range, that's where you get
7 into trouble.

8 So the ergonomist would never want to design something
9 that basically requires or invites the employees to engage in
10 reaches or stretches or raising the arms. That's not good for
11 the employee ergonomically. Their solution wouldn't resolve
12 that issue at all. They would still be stretching across the
13 counter.

14 Dr. Johnson simply disregards the fact, when he complains
15 about standing not being good for you, that, as Dr. Fernandez
16 testified, standing still, like a Beefeater at Buckingham
17 Palace, is a tough thing to do, yes, but if you're constantly
18 in motion, if you're constantly moving your feet, then that
19 alleviates that problem.

20 Antifatigue mats help very much.

21 And then your Honor put this in the correct factual
22 context. The evidence shows you that these cashiers, on
23 average, work only four and a half hours a day; they get a rest
24 break after about two hours, consistent with California law;
25 and in the break room or in the restaurant they can sit down.

1 **THE COURT:** How long is the break?

2 **MR. WOHL:** Fifteen minutes. In fact, they go beyond
3 what is required by law. The law is 10 minutes. They get 15
4 minutes at Kmart.

5 **THE COURT:** Do they get paid for a full eight hours?

6 **MR. WOHL:** Eight hours would be two breaks.

7 **THE COURT:** So they get -- they get paid whatever the
8 hourly rate is, but the workday is four and a half?

9 **MR. WOHL:** Average workday, the evidence showed, was
10 four and a half hours. That's right. Mr. Gonzalez testified
11 to that.

12 **THE COURT:** What is -- what is your view of the
13 evidence on the configuration and the electronics sticking down
14 four and a half inches? Run through that part with me. I am
15 trying to keep that -- how that affects the analysis.

16 **MR. WOHL:** Are you referring to the scanner, Your
17 Honor?

18 **THE COURT:** Correct.

19 **MR. WOHL:** Yeah, so the evidence was the current
20 scanner has a four and a half inch or five inch piece of
21 equipment that's underneath, that further restricts your knee
22 clearance.

23 **THE COURT:** Does it? That's the point I'm trying to
24 find out. Notwithstanding that, would someone be able, if you
25 got the bins out of there -- would there be room for your

1 knees?

2 **MR. WOHL:** So the issue, as Dr. Fernandez described,
3 was, if they're going to be in a seated position, you want
4 their elbows above the work area. You don't want them reaching
5 up. You don't want them reaching down. You want them to be
6 level. So where you put the seat depends on how tall they are
7 and where their elbow height is.

8 And, also, remember the issue of thigh thickness. If you
9 have someone who's got very thin thighs, they can sit higher
10 because there's still clearance. If you have someone who has
11 very thick thighs, you can't. And thigh thickness isn't
12 necessarily related to height. Usually is, but not
13 necessarily.

14 So if you have an extra four or five inches sticking down
15 under the counter, which you have to clear, then that's going
16 to decrease how high you can elevate.

17 And then if you compound that with a thigh thickness
18 problem, you won't be able to sit very high. And so what
19 happens now? You're sitting, but your elbows are up like this
20 (indicating) because you're not sitting high enough to go over
21 them, or you have to unnaturally reach to be over.

22 That's not a good ergonomic solution. And I don't think
23 Dr. Johnson disputed that either.

24 **THE COURT:** What is the distance between the floor and
25 the bottom of the electronics?

1 **MR. MCINERNEY:** Does your Honor -- I don't want to
2 interrupt. It's 31 and a half. Dr. Johnson testified that
3 it's 36 to the top of the counter.

4 **MR. WOHL:** That sounds right to me, too, your Honor.

5 **THE COURT:** Thirty-one and a half. All right. So why
6 wouldn't that leave enough clearance?

7 **MR. WOHL:** Well, it depends, again, on where the
8 person sits. But Dr. Johnson was recommending a stool that
9 would be somewhere between 24 and 26 or 27 inches.

10 And then you've got the thickness of the thighs. And then
11 you're trying to position on top --

12 **THE COURT:** So if somebody was at 25, and they had
13 thick -- I don't know how thick six inches is but -- so you're
14 adding the seat height --

15 **MR. WOHL:** Because you want to leave two inches
16 clearance, your Honor. You don't want to have the thigh
17 immediately against the counter. That would be uncomfortable.
18 You'd have friction and irritation.

19 You still have to have a two inch clearance -- Dr. Johnson
20 said that -- two inch clearance between the top of the thighs
21 and the bottom of the cabinet.

22 **THE COURT:** So what is your view of where that would
23 put the average person in terms of where the -- where their eye
24 level would be?

25 **MR. WOHL:** Well, the point -- one of the points of

1 Dr. Johnson's configuration was to try to put the eye level as
2 the same level as the customer is standing.

3 I think it just depends on the individual. I can't give
4 you a complete answer to that. It depends on the individual.
5 Some could be looking up, some level, some down. Just depends
6 on --

7 **THE COURT:** I don't see how it's physically possible
8 to have your eye level at the same level and still have your
9 feet on the floor.

10 **MR. WOHL:** No, can't have feet on the floor. That's
11 right.

12 **THE COURT:** That's just plain, ole logic. If your
13 legs are bent so that they're getting a rest and they're on the
14 floor then, by definition, the upper part of your body is
15 lowered.

16 But, what if -- what I'm trying to understand is, how much
17 lower would it be?

18 **MR. WOHL:** So, your Honor, let me address that very
19 clearly. Both Dr. Johnson and Dr. Fernandez, particularly
20 Dr. Johnson, agreed you need to have a footrest. You cannot
21 have them sitting on the stool or leaning against the stool
22 with their foot on the ground. That's not a sound position to
23 be in.

24 So your question is exactly right. If their feet are on
25 the ground, that's not going to work. They would not be eye

1 level.

2 **THE COURT:** What does a footrest look like? Is it
3 horizontal, or is it at an angle?

4 **MR. WOHL:** I don't think that they were terribly
5 specific about that. I think they talked about a couple of
6 bars where you have a choice between one or two bars to put
7 your feet on.

8 And a bar is not a true footrest. You have to still exert
9 pressure to keep your foot comfortably on that bar. As opposed
10 to a flat piece of wood, that is a true footrest, that you
11 could rest your whole foot on.

12 I don't think the evidence gives you a satisfactory answer
13 on that.

14 Dr. Fernandez said that depending on where you rank on the
15 percentile of height, that footrest might have to be as high as
16 12 inches or even 14 inches.

17 Because if you're short and are getting yourself high
18 enough up so that you are at eye level and your elbows are
19 above the counter, your feet are so far above the ground that
20 you need a footrest 12 to 14 inches.

21 He says that would create a significant risk of trying to
22 get up and off of that footrest because you're so high up.

23 Your Honor, this is why no retailer uses this
24 configuration. It's an absurd configuration.

25 And, certainly, Aldi and the Europeans don't use this for

1 that very reason. No one could ever imagine you would put a
2 cashier up on a foot -- stool, particularly where in the Kmart
3 model they have to get up and down constantly.

4 The other important issue here --

5 **THE COURT:** Why would they have to get up in the Aldi
6 model?

7 **MR. WOHL:** Because in the Aldi model they don't do the
8 things that Kmart cashiers do. They don't bag. They don't
9 provide customer service. They don't go finding things for the
10 customer. Their job is simply to scan and --

11 **THE COURT:** How do they take care of BOB, over in
12 Aldi?

13 **MR. WOHL:** No evidence they do. We have no evidence
14 they do anything.

15 **THE COURT:** Do they use shopping carts at Aldi?

16 **MR. WOHL:** I'm told that the customer brings the
17 shopping cart up.

18 **THE COURT:** Is that in the record?

19 **MR. WOHL:** I don't even know that this is, your Honor.
20 It was their proof, not ours.

21 **THE COURT:** I don't want you to rely on things that
22 are not in the record.

23 Didn't we have some photographs of Aldi's? Did it show
24 shopping carts?

25 **MR. WOHL:** I think there were some photographs of

1 Aldi. I don't recall if there were shopping carts or not, your
2 Honor.

3 What was undisputed is that the customer does most of the
4 work. It's a different model. And if it works for Aldi, which
5 is a German company, if it works in the UK, that's fine. Good
6 for them.

7 It's not the American model that Kmart and all the other
8 leading retailers use. And nothing in 14(A) says we have to
9 adopt the European model. That's not what the statute says.
10 Or the wage order says. Excuse me.

11 Take a look, your Honor, at the original version of the
12 suitable seating requirement. This is -- the original version
13 the wage order was called Section 23, when it was adopted in
14 1920. And this wage order had language different than what the
15 current version says. I know you can't read that. I'm going
16 to read it.

17 **THE COURT:** I can almost read it, but read it to me.

18 **MR. WOHL:** (Reading)

19 "Seats shall be provided at work tables or machines
20 for each and every woman or minor employed, and such
21 seats shall be capable of such adjustment and shall
22 be kept so adjusted to the work tables or machines
23 that the position of the worker relative to the work
24 shall be substantially the same, whether seated or
25 standing.

1 "Work tables, including sorting belts, shall be of
2 such dimensions and design that there are no physical
3 impediments to efficient work in either a sitting or
4 standing position, and individually adjustable
5 footrests shall be provided. New installations to be
6 provided [sic] by the Commission.

7 So in the 1920s, for the benefit of women and children --
8 this didn't apply to men in those days -- the original version
9 had all types of very substantive requirements for how the
10 workspace would have to be configured, to make sure that the
11 seat would allow the person to work at the same level and would
12 have a footrest, and even to the point that new installations
13 would have to be approved by the Commission.

14 Well your Honor, by 1947, when it was then called Section
15 17, that was dropped. All of that language was dropped. And,
16 instead, it simply reads:

17 "Suitable seats shall be provided for all female
18 employees."

19 The second part is really the predecessor of 14(B), as Mr.
20 McInerney already talked about. But this is all it says:

21 "Suitable seats shall be provided for all female
22 employees."

23 And then it got changed so that by about 1968, it was:

24 "All working female employees shall be provided with
25 suitable seats."

1 And then 1976, when it was expanded to include men, it was
2 the same language which currently exists, which is:

3 "All working employees shall be provided with suitable
4 seats when the nature of the work reasonably permits
5 the use of seats."

6 **THE COURT:** What is your point?

7 **MR. WOHL:** Very significant, Your Honor. The point
8 is, number one, if the IWC, when it went through these
9 iterations, had intended for employers to be governed by these
10 much more specific configuration requirements, it would have
11 retained that language.

12 And Mr. McInerney mentioned the *Brinker* case. If you
13 recall the *Brinker* case, California Supreme Court, in parsing
14 through the meal period requirements of the various wage
15 orders, said that when the IWC or the legislature dropped
16 language that originally was there, that more -- that
17 differently regulated how meal periods should be taken, that
18 was a significant omission and meant that requirement no longer
19 existed.

20 And that's exactly what happened here.

21 **THE COURT:** What was dropped in our case?

22 **MR. WOHL:** Nothing about that you would have to --
23 just what I read, your Honor, that you would have to, number
24 one, have them be capable of such adjustment so that they would
25 be relative -- same level above the tables.

1 And that the work tables, including sorting belts --
2 because recognize, your Honor, this was really originally
3 enacted with an eye towards manufacturing, and probably some
4 textile -- shall be of such dimensions and design that there
5 are no physical impediments to efficient work in either a
6 sitting or standing position.

7 In other words, the original version of this, basically,
8 said it needs to be a sit/stand situation. You need to be able
9 to work either sitting or standing. Well, that's gone. That's
10 been gone since 1947.

11 And for any court to ingraft on what the current language
12 is the reconfiguration requirements that their case depends
13 upon without reconfiguration of the checkstand -- their case
14 goes away because they admit the cashiers can't do the job
15 sitting in the current configuration -- then there is no
16 obligation under Section 14(A). Case goes away.

17 And the case law is very clear, your Honor. When the
18 governing body, the legislation, the regulatory takes away the
19 requirements, the requirements are gone. They are not to be
20 reinstituted through some sort of interpretation by a court.

21 Okay. Let's talk about nature of the work. We went
22 through in the evidence -- and this was both in the job
23 descriptions and Mr. Gonzalez's testimony, as well as testimony
24 of the cashiers -- as to what the job requirements were.

25 And Mr. Gonzalez, who as you recall sitting in the

1 courtroom, was an individual who spent 34 years at Kmart, and
2 has himself worked as a cashier, as well as trained cashiers
3 and supervised cashiers, and worked his way up to where,
4 currently, he is vice president of the company. He took you
5 through the entire process of the checkout. And his emphasis
6 was very clear about, you need to show that excellent customer
7 service and taking care of all the customers' needs in
8 proceeding with the checkout.

9 So he talked about during the transaction all these
10 requirements, which including assisting the customer with the
11 pin pad, including putting the customer items in the cart, as
12 well as, of course, what we saw, handling the merchandise,
13 bagging it, and so forth.

14 He talked about away from the checkstand how you can't
15 stand around, how you have to sort and straighten merchandise.
16 You have to straighten the front end merchandise area.

17 In fact, we saw, your Honor, in the 15-minute video clip
18 that they presented, the cashier, who seemed very friendly,
19 very engaged with her customer, when she was done with the
20 transaction she then attended to her cash drawer. When that
21 was done, what did she do? She walked away to the front of the
22 checkstand and started organizing, straightening the
23 merchandise.

24 That's not a standing job. Excuse me. A sitting job.
25 That's not a job where you sit waiting for the next customer to

1 come. You take care of customers. And when they're gone, you
2 then straighten out your checkout and go outside of the
3 checkout stand.

4 I thought it was very probative of what these folks do.

5 Then of course, your Honor, we had the videos. And we
6 played a lot of videos. And they played videos. And they
7 showed you, I thought, very clearly the actual physical
8 movement of these cashiers.

9 (Photographs displayed.)

10 The big reach for merchandise. Her foot is now off the
11 ground and certainly very extended.

12 Another big reach, where their whole body reached over the
13 counter. And reaching for big items.

14 We saw using the passthrough, what I described before,
15 walking from here, around here, to help her customer.

16 And here, walking through to attend to something in the
17 front.

18 That space is used, Your Honor. They want to get rid of
19 that space, make the cashier walk all the way around. Makes no
20 sense.

21 And, here, again helping the customer with the customers'
22 needs.

23 Using the bagging table. Extensive use of the bagging
24 table when, in the interest of efficiency, it helps move the
25 customer to here, to make room now for the next customer

1 (indicating), instead of having the customer start to
2 congregate there, and that backs up everything else.

3 The purpose of the work is to process the transactions as
4 quickly as possible.

5 The cashier is there to serve the customer. The customer
6 is not there to serve the cashier. That's what they seem to
7 have it wrong.

8 And we saw use of bagging table, including a lot of bags
9 and merchandise. Which, as Dr. Fernandez testified, as you can
10 observe, sometimes include heavy items by themselves or a
11 combination of heavy items, makes the bag very heavy.

12 It's a big discount department store. People tend to buy
13 a lot of items.

14 And we saw the heavy items. This one -- this cashier is
15 handling a 35-pack of water. You recall those are stacked in
16 front of the bagging table.

17 See them right here, your Honor (indicating)?
18 Mr. Gonzalez said their biggest single item they sell, five
19 million units a year, 35-packs of water.

20 Lifting the heavy items. We were guessing it was coolant.
21 I don't know. But it was a large, heavy bottle.

22 And that was, I think, a 6 or 12 -- bigger than 6, 12 or
23 24-pack of soda.

24 This is real, Your Honor. This is not just sort of
25 spinning things or conjecturing. The picture doesn't lie.

1 This is what they're doing.

2 And the test isn't whether they are doing it a hundred
3 percent of the time or some smaller fraction of time.

4 This is what they're doing. They don't know from customer
5 to customer what the needs are going to be.

6 Their opinion is, well, let's make it tougher for the
7 cashier to do this part of the job. That they say this is on
8 behalf of the cashiers, I'm sorry, give me a break.

9 This is going to make it tougher for the cashiers because
10 now when someone comes with that 36-pack of soda, or whatever
11 it is, they've got to make the effort to get off of the chair,
12 move the chair out of the way, and then handle it, as opposed
13 to being standing ready to serve, to accept that large item and
14 get it processed quickly.

15 Look at that item, Your Honor. Maybe not every
16 transaction is a big box like that, but there are certainly
17 some. And they've got to deal with it.

18 They can't tell the customer, sorry, I'm seated, I can't
19 handle that. That's your job. You need to figure it out and
20 bring it to me. Which, frankly, is the Aldi model.

21 I'm not going to dwell on this, for the sake of time, but
22 they had cashiers testify, and those cashiers presented, I
23 would say, a different view of what they were doing.

24 But we have photographs from the videos of their own
25 witnesses handling large items. I believe that's Ms. Hamilton

1 handling a big item. And there she is stretching.

2 **THE COURT:** Do you have a photograph of the bagging
3 table, so that I could see what is inside there?

4 I don't want you guessing what's inside there. You said
5 there are bigger bags. Is there a photograph that demonstrates
6 that?

7 **MR. WOHL:** We will find that for, your Honor. I don't
8 have it in my PowerPoints, but I'm sure we do. We'll get that
9 for you, your Honor.

10 If I may move on.

11 **THE COURT:** Go ahead.

12 **MR. WOHL:** Customer service -- get this moved -- I got
13 it. There we go.

14 Ms. Hamilton was very candid with the Court about customer
15 service:

16 **"QUESTION:** Have you ever asked a customer to bag
17 their own merchandise?"

18 Was the question.

19 "No.

20 **"QUESTION:** Would you ever do that?

21 **"ANSWER:** No.

22 "Why not?

23 "That's not good customer service.

24 "How about working fast and efficiently?

25 "Ms. Hamilton, you agree, of course, that the most

1 important part of your job as a cashier was to keep
2 the customer satisfied, right?

3 **"ANSWER:** Yes.

4 **"QUESTION:** And you knew it was important to Kmart
5 that you work as fast and efficiently as you could,
6 correct?

7 **"ANSWER:** Yes."

8 And look at this, Your Honor:

9 "Me, being as a customer before, I just know I don't
10 want to spend the whole time at the checkouts."

11 We all understand that, your Honor. Nobody wants to be in
12 line for a long time.

13 And, in fact, recall the testimony was, Kmart,
14 Mr. Gonzalez talked about this, has a three-customer-in-line
15 limit. Maybe they don't always achieve it. They strive for
16 it. But they see three customers in line, then the cashier is
17 supposed to ask somebody else to man a new checkout line.

18 Your Honor, I have that photograph with the side of the
19 bagging table. It's Exhibit 15-64.

20 **THE CLERK:** Put it on the Elmo. I'll switch it over.

21 **MR. WOHL:** Okay.

22 **THE COURT:** That picture, on the left side there of
23 the demagnetizer --

24 **MR. WOHL:** I see two racks of bags here (indicating).

25 **THE COURT:** There two racks? Okay.

1 **MR. WOHL:** And that, I believe, are the normal-sized
2 bags. I think that bag hanging on the side of the bagging
3 table is probably the small bag.

4 And then the shelves. And there's three shelves there.
5 Mostly big bags. There could be some additional supplies.
6 Smaller bags, I suppose. I believe the top one or two are the
7 big bags.

8 You saw frequently in the videos, they need those big bags
9 if there's a big item or a bunch of items like the clothing
10 that we saw in their video, the cashier holding and stacking
11 beneath the big bag.

12 **THE COURT:** So tell me only if the evidence is in the
13 record, on the pin thing, do customers put in their pin number
14 on there?

15 **MR. WOHL:** Yes, Your Honor.

16 **THE COURT:** Is that in the record, or is that just you
17 talking?

18 **MR. WOHL:** No, I believe that's in the record. That's
19 used for both credit cards and debit card transactions, as well
20 as, your Honor, it's in the record, that's used for surveys.

21 **THE COURT:** I remember that part.

22 **MR. WOHL:** And do you remember several times we saw in
23 the videos the customer struggled with how to use it, and the
24 cashier had to walk around to show the customer how to use it.

25 Think about it, your Honor, again, the cashier is trying

1 to deliver excellent customer service. If the customer is
2 struggling, the cashier wants to project: I'm here to help.
3 I'll make this process go as quickly and pleasantly for you as
4 possible.

5 If the cashier has to be in an awkward position doing
6 that, it will convey this is a hassle, this is a problem, I
7 wish you weren't bothering me with this. They won't say those
8 words, of course, but that could be the message.

9 That's not the message that Kmart wants to deliver. And
10 Kmart is entitled to deliver a customer friendly image. That's
11 part of its business judgment. That's part of the nature of
12 the work.

13 And look, your Honor, look at the bags that are all here.
14 Those go away because Mr. Johnson wants to push this over, and
15 so now it's right against this counter. You can't use that
16 space for bags anymore. It's all blocked.

17 So where are they going to go? Dr. Johnson didn't give
18 you an explanation for that. He didn't tell you where that's
19 going to go. That's because he hasn't thought it through.
20 This is entirely conceptual.

21 Your Honor, you asked, in one of your questions to the
22 agencies, well, what if you have a job that mixes the two?
23 What if sometimes they're standing, sometimes they're sitting,
24 what does that mean in terms of the nature of the work?

25 The courts in the *Hamilton* case and the *Kilby* case -- so

1 Hamilton/SF Hilton, were the desk attendants, Kilby were the
2 pharmacy cashiers -- they addressed that issue.

3 And they said, you can't just parse out an individual
4 duty, and even though some duties could be performed while
5 seated, that means you give a seat. They said, let's take a
6 common sense approach, let's look at the job as a whole.

7 And if the predominant function of the job is one that
8 requires standing, well, then, there's no requirement to
9 provide a seat.

10 Desk attendants, there could be times that they don't need
11 to be standing --

12 **THE COURT:** What if, in this case, 80 percent of the
13 physical work could be done while seated, does that mean seats
14 should be provided?

15 **MR. WOHL:** If it were truly the case that 80 percent
16 of the job could be done seated, that might well be a different
17 case, your Honor. We concede that.

18 That is sure not this case. That is sure not this case.
19 Everything you've seen shows you that is sure not this case.

20 The Grabau directive -- I'm going to spend just a little
21 time on that. You heard the deposition testimony. It was
22 nothing that they were trying to portray.

23 For better or for worse, Ms. Grabau had a knee jerk
24 reaction which was, gee, if there's a threat of lawsuits on
25 horizon, maybe we can avoid those lawsuits by telling our store

1 managers go ahead and give them seats.

2 Did she really consult with anybody in operations? Did
3 she really think it through? Did she personally think it was a
4 good idea? No. She said she didn't. She just thought this
5 was a good way of avoiding litigation.

6 And, in fact, as you recall, when she told her store
7 managers about the directive, their negative response was: You
8 kidding me? That's crazy. These guys could be hurt if they're
9 trying to do their job seated. Whoever dreamed up this law?
10 That doesn't make any sense for our business.

11 So, obviously, in hindsight, I'd say, gee, I wish she
12 hadn't done that because that creates an issue or an impression
13 that maybe this could be done. But that's not what she meant.
14 And she explained that in her deposition. I think that's a
15 non-issue, particularly given the testimony you've seen.

16 We now then come to the third big issue which your
17 questions talked about, which were the business judgments and
18 what is the role of business judgment?

19 There's no dispute that Kmart's business judgment here is
20 that cashiers need to stand and project that ready-to-serve
21 image. And, in fact, they do need to stand to perform these
22 job duties, in Kmart's judgment.

23 And Dr. Zeithaml, who was the industry or the retail
24 expert on customer perceptions, made clear that this is an
25 industry standard, and there's good reason for it to be because

1 that's what convinces customers that it's a customer-friendly
2 establishment, and that they are there -- sorry, judge, that
3 went too far -- that it did go, for purpose of great customer
4 service.

5 Kmart is not Aldi. So they point to Aldi and ASDA and
6 Wilkinson, and say, well, look, they sit there so why can't
7 they sit here?

8 But it's not the same. In the United States we have a
9 different expectation of customer service. Customer service is
10 all important. Over there, customer service isn't very
11 important.

12 In fact, we heard testimony that at ASDA, they -- take it
13 back. At is Aldi, Dr. Johnson said, the customer has to pay
14 for bags. The customer has to pay for a shopping cart. You
15 have to actually pay money to get a shopping cart. And, of
16 course, you bag your own items.

17 That is not the Kmart model. They want to do it
18 differently in Europe, God bless 'em. That's not our model.

19 We cite your Honor to the *Hamilton vs. Hilton* and *Kilby*
20 *vs. CVS Pharmacy* case. In both of those cases, the Court said
21 the employers' business judgment that, respectively, hotel desk
22 attendant and drugstore cashiers need to stand to project a
23 ready-to-serve image, that those were legitimate judgments by
24 the employer.

25 And here's a very important point, your Honor. They

1 wanted to portray this as the law requires seats and the
2 employer's business judgment can't trump that.

3 I would agree that if the law requires seats, business
4 judgment does not trump that. You asked the example what if
5 the employer wanted to have just female cashiers. We don't
6 want to have male cashiers serving our customers. But the law,
7 Title VII, says you can't do that. You can't discriminate.
8 The correct answer is, too bad, you have to have male cashiers.

9 What's different about this case? The predicate is the
10 nature of the work. Again, 14(A) does not say provide all
11 employees with seats, or employ all employees with seats with
12 the physical demands required.

13 It says provide seats when the nature of the work
14 reasonably permits it. And the employer's judgment about what
15 that work is about, what is the job supposed to do, is part of
16 the determination in the first instance.

17 **THE COURT:** Your time is up. Take one minute to wind
18 up.

19 **MR. WOHL:** Thank you, Your Honor.

20 I'm going to use my time to talk, just quickly, about
21 penalties. I don't think you'll get to this point, but I do
22 need to mention it.

23 PAGA, of course, invests in you discretion as to whether
24 to award penalties and, how much penalties to award, and says
25 that you can decline or at least reduce them if in the

1 circumstances of the particular case to do otherwise -- that is
2 not to reduce -- would to result in an award that is unjust,
3 arbitrary, and oppressive or confiscatory.

4 Your Honor, I cannot think -- and I've been doing this for
5 over 30 years now. I can't think of a case that is more
6 compelling why penalties should not be assessed, even if you
7 were to find a liability.

8 What's been the industry standard? Are we outliers here?
9 Are we the only ones who aren't providing seats?

10 The industry standard is, none of them provide seats. We
11 are totally in line with what everyone else has been doing all
12 the time.

13 The wage order, in one form or the other -- in fact, as we
14 saw, an even more onerous wage order -- has been in effect
15 since 1920. How many DLSE enforcement actions have there been
16 over nearly a century against employers to provide seats to
17 cashiers? None. Zero.

18 My friend, Mr. McInerney, misstated. He said the DLSE
19 would have to go to the district attorney and take out a
20 criminal complaint. That's not true.

21 The DLSE could issue a citation and assess a penalty, and
22 then it would go to civil court to decide whether that was well
23 founded or not.

24 The DLSE, of course, could simply contact the employer and
25 say, gee, I think you're doing this wrong. I think you need to

1 provide seats. How many times have they done that? Zero.
2 Zero.

3 **THE COURT:** You are well over your time now.

4 **MR. WOHL:** The only two opinions are out there are in
5 favor of not providing seats, and then all the cases have said
6 no seats.

7 All right, your Honor. I'm sorry.

8 **THE COURT:** Your time is up.

9 **MR. WOHL:** All right. *Christopher vs.* --

10 **THE COURT:** You'll get your chance to put in findings
11 of fact and conclusions of law, which I still have to read.

12 Five minutes, Mr. McInerney.

13 **REBUTTAL ARGUMENT**

14 **MR. McINERNEY:** Thank you for your indulgence, Your
15 Honor. I appreciate it.

16 First of all, a lot of points to cover, and they may come
17 in a little disjointed. I apologize.

18 With respect to what the DLSE could have done in the past,
19 they could have issued citations, but they could only collect a
20 penalty if it was specifically provided in the Labor Code
21 before. Before 2004, there was none.

22 The testimony of Johnson was that he thought it was best
23 bagging on top. That's why he would put the bags on top, so
24 you could slide the items in.

25 We talk about --

1 **THE COURT:** If you to that, where are you going to put
2 the goods once they're bagged?

3 **MR. MCINERNEY:** Well, that's it. You create more room
4 by moving it over, your Honor.

5 **THE COURT:** No, you said you were going to truncate
6 that and reduce -- you were going to cut off the top part of
7 that bag.

8 **MR. MCINERNEY:** Cut that off, your Honor, slide it
9 over. I put the bags here, on top. The cashier takes a bag
10 and brings it to slide the items into. (Indicating.)

11 **THE COURT:** All right.

12 **MR. MCINERNEY:** There's no lifting.

13 **THE COURT:** But once that's done, where would the
14 bagged item go?

15 **MR. MCINERNEY:** Okay. You've got to pretend it's over
16 here, right (indicating).

17 **THE COURT:** Yes.

18 **MR. MCINERNEY:** Okay. You reach for the bag, you
19 slide the items in, and then you've got all this area to push
20 bags on to (indicating).

21 **THE COURT:** But that's where you had the bags to begin
22 with.

23 **MR. MCINERNEY:** No, I got the bags here your, Honor
24 (indicating).

25 **THE COURT:** That part you said you were going to cut

1 off.

2 **MR. MCINERNEY:** No, no. I cut this part off, this top
3 inch. I put the bags here, okay. (Indicating.)

4 **THE COURT:** Uh-huh.

5 **MR. MCINERNEY:** I've got all this new area
6 (indicating).

7 **THE COURT:** All right. So you have that area, but it
8 would be -- roughly speaking, it's going to be 30 to 40 percent
9 of the unused area to fill the bags in, as opposed to a hundred
10 percent they have now.

11 **MR. MCINERNEY:** Yeah, but look at the film. They're
12 not using the whole area. Remember --

13 **THE COURT:** That's not true. I saw instances where
14 the whole area was being used.

15 **MR. MCINERNEY:** There certainly are. And in those
16 cases, presumably the customer would have a cart, and the
17 customer would start putting things in the cart.

18 But, remember, we've got to talk about the norm here
19 because the norm is 5.6 items per transaction. And when we
20 talk about how often a cashier would have to rise, assuming
21 they were seated, assuming they were seated, it's once every
22 ten minutes, if I recall the testimony. That's when you've got
23 a heavy item, once every ten minutes.

24 You know, this statute doesn't say, you know, seats will
25 be provided, shall be provided when the nature of the work

1 requires continuous seating. It says when it permits it.

2 The cashiers, depend on how they feel, if they're tired or
3 not, they may elect to do this standing. I mean, it's not the
4 idea that they -- they're required to sit, and then they have
5 to pop up every ten minutes, or whatever it may be in reality,
6 okay. It provides an opportunity for rest and recovery if the
7 worker wants to use it.

8 And there have been a lot of phony issues here --

9 **THE COURT:** Well, but in between customers they're
10 supposed to be -- they're supposed to abandon the workstation
11 and go straighten out shelves.

12 **MR. MCINERNEY:** And that's fine. You know, if they've
13 got to go straighten the candy, or even go further and
14 straighten the blouses, sure they can walk away. They don't
15 have to sit. It's no requirement. It's the idea of giving
16 them a seat if they want to use the seat if they're getting
17 tired. It's as simple as that.

18 And we got to keep focusing on the nature of the work.
19 And the nature of the work is scan and bag heavy items every
20 ten minutes.

21 This stuff about reach, the counter, that counter is 23
22 inches. We're not talking about extended reaches.

23 This is really -- you know, we talk about these water,
24 okay. But Mr. Gonzalez was talking about Super Ks and Big Ks.
25 This is a Big K. It's not a full grocery store, okay. So

1 maybe water gets sold by the truckload at a Super K, the
2 grocery-type Kmart, okay. But these films were taken in
3 August, in Tulare. It's warm in August, in Tulare, California.
4 How many cases of water did you see?

5 We've got to focus on Tulare. We've got to focus on a Big
6 K. And we've got to focus on what's the nature of the work.
7 If we spin off on to designing workstations for the future,
8 we're in la la land.

9 You know, one of the questions we had during certification
10 is, where is this work performed? Well, we now know because
11 there was a circle created in that small mat. And that circle
12 tells us where the cashier's work is performed.

13 He says, well, these cashiers talked about it. Well, let
14 me ask, where are the other 65? Where are the 65 they got
15 subpoenaed? Where are the three that were on their rolling
16 witness list?

17 These cashiers that we put on, they represent the work of
18 the cashiers. They are the only ones who testified.

19 And if we want to talk about Ms. Grabau, where's
20 Ms. Grabau? Where is she, to explain what she meant and
21 thought?

22 Ironically, when you read her testimony carefully, she's
23 asked, well, tell us -- Mr. Righetti asked her in her depo,
24 tell me, which -- which instance do you actually know where a
25 manager followed your policy and gave a seat?

1 She said, well, I know one up in Santa Rita because I was
2 there. And the manager was confronted with a situation where a
3 cashier was requesting a stool. And the manager said, well,
4 she doesn't have a doctor's note. And, see, that's the old
5 policy. It tumbled out in Grabau's testimony.

6 And Ms. Grabau says, well, I told that manager she doesn't
7 need a doctor's note because now, here in California, we just
8 give it on request.

9 And when you give a seat on request, okay, what does that
10 imply? It implies that they believe that the essential
11 functions of the cashier could be done while seated.

12 It's not if the cashier comes up and requests a seat, oh,
13 send them home without pay. Just send 'em home. No. It's, go
14 get a wooden stool. This is what she said, go get a wooden
15 stool and give it to them.

16 And they can't -- they can't move away, they can't move
17 away from what their practice is.

18 Now, practice to me is a stronger word than policy.
19 Practice to me implies what was actually done, okay.

20 And they used -- can I get that one exhibit? I'm sorry.
21 Here, let me see if I can find it. Come on up here.

22 Your Honor, I want to say, while I'm fumbling through this
23 as an old lawyer, that we -- we do appreciate the patience of
24 the Court not only with old lawyers but in allowing younger
25 lawyers to testify -- or not to testify.

1 **THE COURT:** Well, I certainly have heard a --

2 (Laughter)

3 **MR. DOSTART:** I apologize.

4 **MR. MCINERNEY:** It's us old lawyers who want to
5 testify, you know.

6 But the Court -- I never really thought of it so much, but
7 it is a wonderful training thing.

8 **THE COURT:** What are you looking for, Mr. McInerney?

9 **MR. MCINERNEY:** Well --

10 **THE COURT:** What was it?

11 **MR. MCINERNEY:** I'm looking for the page out of the
12 summary judgment.

13 **THE COURT:** You mean something I said?

14 **MR. MCINERNEY:** Yeah. Here it is. No, no, Your
15 Honor. It's something that Kmart said.

16 **THE COURT:** Oh, all right.

17 **MR. MCINERNEY:** Put that up.

18 (Document displayed.)

19 **MR. MCINERNEY:** Now, you know, we talk about those
20 prongs that used to stab the cashiers when they tried to walk
21 in that aisle?

22 Well, you know, there are prongs in Rule 11. And I think
23 the prongs are out here that they tried to back away, because
24 right there, at line 14, under "undisputed facts," undisputed
25 facts:

1 "However, it has been Kmart's practice during the
2 relevant time period to give cashiers seats upon
3 request."

4 Pretty hard to avoid the implication of that.

5 So if I have even 30 seconds left, I'd like to save that
6 in case I ever have the pleasure of trying another case in
7 front of your Honor.

8 **THE COURT:** Thank you, Mr. McInerney.

9 All right. We will look forward to reading your findings
10 of fact proposed and conclusions of law proposed.

11 Remind me when those are due. I have forgotten what the
12 order said.

13 **MR. MICHAEL RIGHETTI:** Appears nobody knows.

14 **MR. MATTHEW RIGHETTI:** We think it's the Wednesday
15 after Thanksgiving. So I think it's the same day as the
16 submissions to the labor commissioner.

17 **THE COURT:** All right. Great.

18 **MR. ADKINS:** 28th, correct? 28th, your Honor.

19 **THE COURT:** Okay. I've run out of questions.

20 I want to say that neither side came close to using all of
21 the time that was allocated to you. So -- I'm talking about
22 evidence time. So please do not complain to the Court of
23 Appeals that there were time limits.

24 You told me upfront you were going to call 75 witnesses
25 and it would be Armageddon, you needed all this time it turned

1 out you didn't need. I gave you all the time.

2 And no one even referred to the mockup that was sitting
3 here in court, and all that. So you can take the mockup away.

4 Is that the slide 2B that has the -- does that have the
5 handwritten -- that one, I want you to leave behind. I need to
6 consult that.

7 And be sure when you leave here today that every single
8 exhibit that is in evidence is with Dawn, so that when this
9 case goes to the Court of Appeals those exhibits can go up
10 there, too.

11 All right. Done?

12 **MR. MCINERNEY:** Yes, Your Honor.

13 (Counsel simultaneously reply.)

14 **THE COURT:** Thank you counsel.

15 (Counsel simultaneously thank the Court.)

16 (At 11:40 a.m. the proceedings were concluded.)

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I N D E XDEFENDANT'S WITNESSESPAGEVOL.

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E X H I B I T S

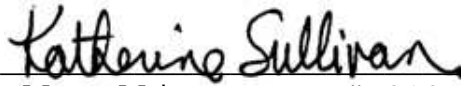
<u>TRIAL EXHIBITS</u>	<u>IDEN</u>	<u>VOL.</u>	<u>EVID</u>	<u>VOL.</u>
218-E and 218-G			1061	6
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CERTIFICATE OF REPORTERS

We, KATHERINE POWELL SULLIVAN and DEBRA L. PAS,
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Northern District of California, hereby certify that the
foregoing proceedings in C 11-2575 WHA, **Lisa Garvey vs. Kmart
Corporation**, were reported by us, certified shorthand
reporters, and were thereafter transcribed under our direction
into typewriting; that the foregoing is a full, complete and
true record of said proceedings at the time of filing.

DATE: Tuesday, November 20, 2012



Katherine Powell Sullivan, CSR #5812, RPR, CRR
U.S. Court Reporter



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